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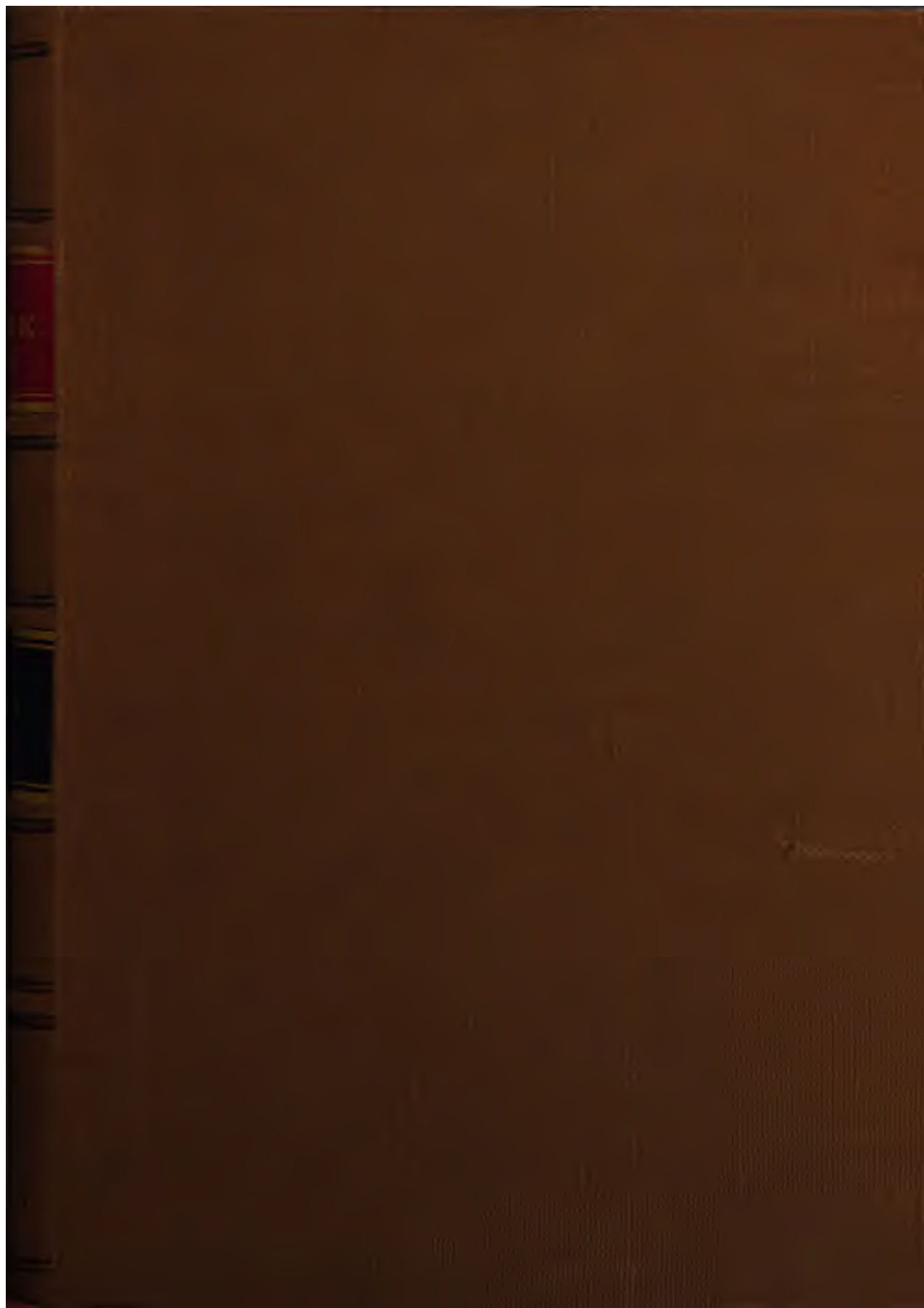
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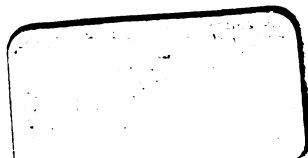
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REPORTS
OF
CASES DETERMINED
BY THE
SUPREME COURT
OF
NEW BRUNSWICK,

WITH
TABLES OF THE NAMES OF THE CASES AND PRINCIPAL MATTERS.

REPORTERS:
WILLIAM PUGSLEY, A. B., B. C. L.
AND
GEO. W. BURBIDGE, A. M., Barristers-at-Law.

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JUDGES
OF THE
SUPREME COURT OF NEW BRUNSWICK
DURING THESE REPORTS.

THE HONORABLE JOHN CAMPBELL ALLEN, C. J.

“ “ **JOHN WESLEY WELDON.**

“ “ **ANDREW RAINSFORD WETMORE.**

“ “ **CHARLES DUFF.**

“ “ **ACALUS L. PALMER, JUDGE IN EQUITY.**

“ “ **GEORGE E. KING.**

ATTORNEY GENERAL.

THE HONORABLE JOHN JAMES FRASER.

SOLICITOR GENERAL.

THE HONORABLE J. HERBERT CRAWFORD.

•

ERRATA.

- Page 23—in line 9 from bottom, strike out “and” before the word “affect.”
- “ 85—in line 3 from bottom, for “is in the usual” read “is the usual.”
- “ 180—in line 16 from bottom, strike out “King, J.”
- “ 193—in line 15 from bottom, strike out “Wetmore, J.”
- “ 251—in line 5 from top, for “point to a prior slander” read “point a prior slander.”
- “ 270—in line 9 from bottom, for “Earle” read “Erle.”
- “ 270—last line, for “L. R. 2 P. C. 35” read “L. R. 2 P. C. 535.”
- “ 311—in line 6 from bottom, for “Duff, Palmer and King, JJ.” read “Palmer, J.”
- “ 360—in line 5 from top, for “twenty” read “seventy.”
- “ 459—in line 14 from top, for “a conviction” read “an indictment.”
- “ 469—in line 14 from top, after the word “violence” insert “and we have certain
violence proved at the time when the disease is shewn to have had its origin.”
- “ 503—in line 4 from top, for “official” read “special.”

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CASES DETERMINED
BY THE
SUPREME COURT OF NEW BRUNSWICK
IN
EASTER TERM, XLIV. VICTORIA.
(Continued.)

1881.

April.

CORMIER v. McKEE, ET AL.

[Full Court, before ALLEN, C. J., and WELDON, WETMORE, DUFF and PALMER, JJ.]

Costs—Certificate for—Where action is in this Court, and jury find less than \$100—Title to land not brought in question—Certificate granted.

The defendant having leave to cut lumber on land adjoining the plaintiff's, was warned by the plaintiff to be careful that he did not cut on his land. The defendant paid no attention to the warning, and took no trouble to ascertain where the line was, but told his men to continue cutting, saying that he would make it all right. In an action brought for the trespass, the defendant did not question the plaintiff's title. The plaintiff recovered less than \$100. The Chief Justice granted the plaintiff a certificate for costs.

Held, (by ALLEN, C. J., and WELDON and DUFF, JJ., WETMORE and KING, JJ., dissenting), that the certificate was rightly granted.

April 13, 1881. *Phinney* moved for an order to rescind a certificate for costs, and cited *Robertson v. Clerk*,¹ *Nevers v. Duffy*.² The certificate was granted by the Chief Justice, it being understood the defendants were not to be prejudiced.

The action was for trespass to lands. The defendants pleaded not guilty, and the plaintiff recovered less than \$100. The only question to be determined is, whether the title to land *bona fide* came in question, and there is no evidence whatever that it did.

Weldon, Q. C., contra. It is very embarrassing for counsel to advise an action for trespass *quære clausum fregit*, as defendant may raise the question of title.

Here defendants had to raise a question of title by contending that under the plea of "not guilty" they were entitled to succeed because plaintiff had not proved possession.

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The damages were entirely too small. The defendants were cautioned, and took no steps, according to their own shewing, to find out that they were within their line; \$150 or \$200 would not have been excessive. The learned Chief Justice was right in granting this certificate.

Phinney, in reply. In this case the trespass was not wilful, and the jury must have so found.

Cur. adv. vult.

The following judgments were now delivered :

ALLEN, C. J. I thought this was a case in which the plaintiff was entitled to costs.

Where a trespass of this kind was committed on a person's land, *prima facie*, he was entitled to sue in the Supreme Court, as he could not tell what defence would be set up, and he was not bound to sue in the County Court, and run the risk of having his suit stopped by the defendant raising a question of title.

A plaintiff was not bound, before suing, to go to the defendant and ascertain whether the trespass was wilful or not. It was the defendant's duty, if he had gone on the land by mistake, and committed the trespass involuntarily, to go to the plaintiff and endeavour to make compensation for the damage, and if he could not settle with the plaintiff, and an action was brought, he could either pay into court, or offer to confess a judgment for an amount which he thought sufficient to cover the damages, and protect himself against costs in that way. In the present case, instead of taking either of these courses, he never attempts to settle with the plaintiff, but resists him to the end, putting him to the expense and trouble of a trial, hoping, perhaps, to defeat him on some defect in the evidence.

If he had permission to cut on Nolan's land, it was no excuse for the trespass that there was no visible line between the plaintiff's land and Nolan's. It was the defendant's duty to find out where Nolan's boundary was, and not to cut over it; but it rather appeared to me, from the evidence, that he thought he could not be made liable for a trespass, because no line had been run between the plaintiff's lot and Nolan's; for when he was warned to be careful, and was told that he might be cutting on the plaintiff's land, he paid no attention to it, and took

no trouble to ascertain how far Nolan's land extended, but told his men to continue cutting, saying that he would make it all right. It looked very much like a wilful trespass. If he did not actually know that he was cutting on the plaintiff's land, he appeared to be entirely indifferent whether he was doing so or not. There was nothing but his own statement, that he thought he was working on Nolan's lot. He did not go on the stand and swear to his belief of it.

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As to the amount of damages, the witnesses proved fifty trees cut, fit for lumber. Their value was, perhaps, \$18 or \$20; but, admitting that they were not worth over \$11, as stated by the defendants' counsel, they were cut without the plaintiff's authority. The defendant also cut four roads, extending nearly across the plaintiff's lot, and must necessarily have cut a number of other trees, besides those which he hauled away to his mill; and everybody knows that lumberers are not particularly careful as to the number of trees they cut, or how they cut, when they are getting logs. Under the circumstances, I thought the damages given were small.

I directed the question to be brought before the Court, as the rule regulating the certifying for costs was not in a very satisfactory state, and my mind was not fully made up when the application was made to me, immediately after the trial.

WELDON, J. I am of opinion the certificate of the Chief Justice (who tried the cause) for full costs, should not be interfered with.

The action was for trespass to land. The plaintiff's right thereto could be questioned, and if questioned, could not be tried within the jurisdiction of the County Court. It, therefore, would not have been prudent to have brought the action in that Court.

The discretion of the learned Judge, who tried the cause, has been exercised, and he is best able to appreciate its character and fitness for a Supreme Court, and I think we ought not to interfere with his decision, upon the grounds that have been urged here.

It is a case solely in the discretion of the Judge who tried the cause, and who is more competent to decide upon the propriety of the action being brought in this Court than one who

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did not try the cause. If the lines were disputed, it could not be tried in the County Court.

WETMORE, J. I differ from the opinion expressed by my learned brethren. I think a plaintiff should know both his title, and the damage which has been done. He has no right to assume his title will be attacked. His business is to bring his action in the proper court. If his damages are under \$100, he should go to the County Court. If the title to land is raised no damage is done him, because he is simply sent up to the Supreme Court. True, he has to pay costs, but he gets them back as damages. As to the damages, that is entirely for the jury.

DUFF, J. I concur in the opinion of the learned Chief Justice.

KING, J. I am sorry I cannot concur in the judgment of the majority of the Court. This matter is in one sense referred to us, and it is our duty to decide, though I should have preferred that the Chief Justice should have done so.

The title to land was not raised, and it does not seem to me that the plaintiff had any reason to suppose defendant would claim the land.

The plaintiff could, it seems to me, have seen the defendant to ascertain what claim he would set up. There does not seem to me anything to lead us to conclude that the damages are so much below what they ought to be as to warrant us in granting costs on this ground. This, and the fact that defendant, McKee did not go on the stand were for the jury.

Application refused.

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April.

WILBUR, ADMINISTRATRIX, v. JONES.
(Equity Appeal.)

[Full Court, before ALLEN, C. J., and WELDON, WETMORE, and DUFF, JJ.]

Estoppel—Admissions by an infant—Appeal—On questions of fact—Jones v. Calkin,¹ and Hilland v. Hamm.²

In a Court of Equity an infant stands in no different position from a person of full age in relation to matters of fraud, and therefore if he makes a representation upon which another person acts, he will not be allowed to impeach the validity of it on the ground of his minority.

The decision of the Judge in Equity on a question of fact will not be reversed on appeal, unless it clearly appears that his decision was not only wrong, but entirely erroneous. *Jones v. Calkin*, and *Hilland v. Hamm*, approved.

Appeal from a judgment of Mr. Justice Palmer, Judge in Equity.

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The plaintiff as administratrix of Archibald Steeves brought this action against the defendant, claiming to be paid out of the defendant's land the amount of a legacy bequeathed to Archibald Steeves by his father, Charles Steeves. It was not disputed that the land was charged with the legacy. The objections to the plaintiff's right to recover were: (1) That the legacy had been paid; and (2) That the plaintiff was estopped by the admissions of Archibald Steeves from denying the payment. In answer to the evidence of payment, the plaintiff set up and gave evidence of the minority of Archibald Steeves at the time.

February 17th, 1880. *A. G. Blair*, in support of the appeal. The evidence did not warrant Mr. Justice Palmer in coming to the conclusion that Archibald Steeves was paid, or that he was of age, or that he made representations to William Pennington, (the defendant's grantor), which would work an estoppel. *Jones v. Calkin*;¹ *Gray v. Turnbull*;² *Rodgers v. Powell*.³

T. C. Allen, contra. An appellate court ought not to be called upon to decide which side preponderates on a mere balance of evidence: *Jones v. Calkin*.

Where the evidence is not taken in the presence of the Court, but upon written depositions, the rule is the same: *Gray v. Turnbull*. A clear *prima facie* case was made out. The burden of proving infancy was on the plaintiff. *Wright v. Snowe*;⁴ *Drury v. Drury*;⁵ *Nelson v. Stocker*;⁶ *Teynham v. Webb*;⁷ *Simpson on Infancy*, pp. 68, 97. But apart from this, the plaintiff states in the bill Archibald Steeves' age when he died, which would make him of age when the admissions were made, and this estops him from alleging to the contrary.

Blair, in reply.

Cur. adv. vult.

The following judgments were now delivered:

ALLEN, C. J. This is a suit brought by the administratrix of Archibald Steeves, claiming to have a legacy bequeathed to

¹ 3 Fuga. 376.

² L. R. 2 H. L. Sc. App. 58.

³ 18 W. R. 282.

⁴ 2 DeG. & S. 321.

⁵ 5 Bro. C. C. 570.

⁶ 4 DeG. & J. 458.

⁷ 2 Ves. Sr. 312.

1881. him by his father, Charles Steeves, paid out of land owned by
the defendant.

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JONES.

It was not disputed that the land was charged with the legacy; but the objections to the plaintiff's right to recover, were: 1st, That the legacy had been paid; and 2nd. That the plaintiff was estopped by the acts of Archibald Steeves from denying the payment. In answer to the evidence of payment, the plaintiff set up and gave evidence of the minority of Archibald Steeves at the time.

Charles Steeves died in January, 1846, leaving several children, to whom he bequeathed legacies; among others, to his son Archibald, a legacy of £100, one-half of which was to be paid on the 1st Jan'y, 1865, and the balance on the 1st Jan'y, 1883. He devised his real estate, charged with the several legacies, to his son Enoch, whom he also appointed one of his executors. In June, 1858, Enoch conveyed the land to one Pennington, under whom the defendant derived his title.

The evidence of the payment of the legacy, was the declaration of Archibald Steeves that he had got his pay; that his brother Enoch had settled with him, and given him some land and money. This admission was alleged to have been made in 1858, and was proved by Job Steeves, Rufus Steeves, Samuel McLean, Angus McFee, and William Pennington. Opposed to this, was the evidence of Rachael Wilbur, the plaintiff, the eldest sister of Archibald Steeves, who swore that her brother Enoch gave Archibald a piece of land, which he (Archibald) said was on account of his legacy, but that the land was worthless, and she made Enoch take it back, and that he did so, and sold it afterwards; and that Archibald at that time was only about fifteen years old. There was no evidence of any conveyance of land from Enoch Steeves to Archibald.

The effect of the evidence of Charles Steeves, a brother, and of Elizabeth Horseman, a sister of Archibald, was to prove that in 1858, when Archibald was said to have made the admission of the payment of his legacy, sworn to by Job Steeves and the other witnesses, he was not of age. It was not disputed that Archibald had left the Province in that year and had never returned, and died, probably about the year 1865 or '66, though the time of his death is not distinctly shown.

Mrs. Horseman, who spoke very positively on this point, said that Archibald was about nineteen or twenty years of age at the time he left the Province; that she, herself was fifty-two years old in March, 1878, and that Archibald was about thirteen years younger than she. On her cross-examination she stated unqualifiedly that she was certain about his age, and that he was not twenty-one years old when he left the country. According to her evidence, Archibald was born in the year 1839, and consequently would have been under twenty years of age when the conveyance was made by Enoch to Pennington.

Charles Steeves, who said he was forty-four years old, when he gave his evidence (Nov. 1878), that his birth-day was the 23rd October, and Archibald's, the 11th January, stated that Archibald was three years and nearly three months younger than he, and that when Archibald left the Province in the fall of 1858, he was under age, and would not be of age till the following January. If this witness was correct as to his own age, he must have been born in October, 1834, and if Archibald was more than three years younger, and was born in January, he (Archibald) must have been born in 1838, and consequently would have been under twenty-one years of age when he left the Province in the fall of 1858, before which time, viz.: in June, Pennington purchased the land from Enoch.

Mrs. Wilbur, the plaintiff, stated that Archibald was a small boy, six years old, when his father died in 1846, and she thought he was in his eighteenth year, when he left the Province. According to her evidence, he must have been born in 1840.

Neither Job Steeves, Rufus Steeves, nor McLean spoke with any certainty of Archibald's age at the time they said he told them he had received his legacy; but McFee stated that he asked Archibald how old he was at that time, and that he said he was about twenty-two. Pennington stated that when Archibald told him he had been paid his legacy, he (Archibald) was a man, and doing business.

It was contended by the defendant's counsel on the argument before us, that the plaintiff's bill admitted, in effect, that Archibald was born in 1835. The statement in the 10th paragraph of the bill is, that Archibald died, about the 1st March, 1865, being at the time of his death, of the age of thirty years.

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Unless this admission is conclusive, I should say that the weight of the evidence was adverse to the contention that Archibald was of age in June, 1858. If he was not of age at that time, I should hesitate to hold him to be bound simply by loose evidence of his admission that his legacy had been paid, if better evidence of the payment could have been obtained,—which clearly could have been done in this case. The onus of proving payment was on the defendant, and it is somewhat singular that, if Archibald had been paid in land as alleged, there was no evidence of any conveyance, and that the fact of payment was not proved by Enoch, who was alive and in the Province. Admissions, sworn to have been made by a person, since deceased, are a very unsatisfactory kind of evidence and have been said more than once, to be entirely unreliable. The first instalment of this legacy was not payable till January, 1865, at which time the legatee, if alive, was living out of the Province, and died soon afterwards. Admitting that Archibald had settled with his brother for the legacy in 1858, if he was then under age, he ought not to be bound by that settlement, without evidence of the nature of it, so that it would appear that no advantage was taken of him. The fact that it is said to have taken place nearly seven years before the first instalment was payable, and twenty-five years before the balance of it was due is somewhat suspicious, in the absence of all evidence of the fact of payment and of the time when, and the manner in which it was paid, except the loose statement that Archibald admitted twenty years ago that he had got his pay in land. Better evidence of payment, if there was payment, could and ought to have been produced.

The Judge in Equity having come to the conclusion that the legacy was paid, it may be, and probably it is so, that his decision on the question of fact cannot be appealed from, although we might think that the fact of payment was not established, unless it clearly appears that his decision was not only wrong, but entirely erroneous: *Gray v. Turnbull*;¹ *Jones v. Calkin*;² *Hilland v. Hamm*.³

Had the decision of the case turned on the fact of payment alone, it would have been necessary to determine how far the

¹ L. R. 2 Sc. App. 53.

² 3 Fuga. 356.

³ P. & B. 289.

finding of the Judge in Equity was conclusive under the particular circumstances of this case, and where most of the witnesses were not examined before him.

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Another point; the minority of Archibald in 1858, and its effect upon his alleged admissions, is not referred to in the judgment, though it certainly was raised by the evidence given on the part of the plaintiff, but would not seem to have been contemplated when the bill was drawn, otherwise the plaintiff's solicitor would scarcely have made the allegation which he did in the 10th paragraph. It is said in *Dan. Pr.* (3rd ed.) 670, that the facts alleged in a bill, when they are alleged positively and not by way of pretence, are constructive admissions in favor of the defendant of the facts alleged, and therefore need not be proved by other evidence; for whether they be true or not, the plaintiff by introducing them into his bill, and making them part of the record, precludes himself from afterwards disputing their truth. In *Boileau v. Rudlin*,¹ and *Doe v. Ross*,² the statements in a bill in equity were held not to be admissible as evidence against the plaintiff in another suit in which he was a party. But in the suit in which the bill was filed, I am inclined to think the plaintiff would be precluded from disputing the truth of such an admission as is made in the 10th paragraph of the bill, and that the evidence respecting the age of Archibald, if objected to, should not have been received. But as the evidence was received, and the effect of it was argued before us, it might have been necessary to determine how far this admission was binding, had the decision not turned on different points.

The Judge in Equity decided, not only that the legacy to Archibald had been paid, but also that he having represented to Pennington, when he was in treaty with Enoch Steeves for the purchase of the land, that his (Archibald's) legacy was paid, and that he had no claim upon the land, and that Pennington having purchased and paid for the land on the faith of that representation, Archibald Steeves, and the plaintiff as his representative, were estopped from denying such payment.

As a general proposition the correctness of this doctrine cannot be disputed. The plaintiff, however, contended that it was

¹ 2 Exch. 665.² 5 Allen 346.

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not applicable in this case, if Archibald was a minor at the time he made the representation. Admitting for the purpose of the argument, that he was an infant, that would not release him from responsibility if his conduct was fraudulent. In a court of equity, an infant stands in no different position from a person of full age in relation to matters of fraud; and therefore, if he makes a representation upon which another person acts, he will not be allowed to impeach the validity of it on the ground of his minority: *Wright v. Snowe*; ¹ *Nelson v. Stocker*.²

The evidence here shews that Archibald Steeves, knowing that Pennington was about to purchase the property, and was making enquiries to ascertain whether it was free from the encumbrance of the legacies, told him that he (Archibald) had got his pay, meaning, of course, his legacy, and that he had received it in land. Whether he told the truth or not, is not the question. The material question is, did he make that representation to Pennington, and did Pennington, believing it to be true, act upon it, and purchase the property? The Judge in Equity has found that he did so, and the evidence of Pennington—not only uncontradicted on this point, but corroborated as to Archibald's admissions of payment, sustains the finding.

It was contended that Pennington relied upon the covenant of warranty in his deed, and not upon the representation made to him. I do not see why he might not rely upon both. He stated that he relied upon his warranty with reference to those legacies which had not been paid, of which there were unquestionably two.

On the ground that Pennington purchased the property on the faith of the representation by Archibald, that his legacy had been paid, and that the plaintiff, as the representative of Archibald, is estopped from disputing the truth of his admission, I think this appeal should be dismissed.

WELDON and DUFF, JJ., concurred.

WETMORE, J. I concur in the judgment of the learned Chief Justice. But I do not wish to be understood as adopting the views of Lord Justice James, in reference to the credit to be given to testimony regarding the estates of deceased persons. All evidence should receive its credit from the character of the

¹ 2 DeG. & S. 321.

² 4 DeG. & J. 458; 5 Jur. N. S. 202.

witness, the manner in which it is given, and from the surrounding circumstances. The death of any party should not necessarily have any effect upon the credit to be given to testimony.

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Appeal dismissed without costs.

BROWNELL v. RAWORTH.

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[1st Division, before ALLEN, C. J., and DUFF and PALMER, JJ.]

April.

*Pleading—Written agreement—What is a sufficient consideration—
Averment of consideration—When it may be implied.*

The declaration set out an agreement in writing, providing that certain acts should be done by the defendant, but neither averred any request by the defendant to the plaintiff, nor any consideration moving from the plaintiff to the defendant, except that the plaintiff should accept a deed from the defendant of certain property, and allow the defendant to remain in possession thereof for a certain specified time.

Held, that the consideration was sufficient to support the agreement, and that in such a case a request might be implied.

The declaration in this case was as follows :

“ IN THE SUPREME COURT,

“ THE 6TH DAY OF SEPTEMBER, A. D. 1880.

“ WESTMORLAND, to-wit : Edwin Brownell, by W. W. Wells, his attorney, sues William Calvin Raworth, who has been summoned to answer the said Edward Brownell, by virtue of a writ issued on the fifth day of June, in the year of our Lord one thousand eight hundred and eighty, out of Her Majesty's Supreme Court of Judicature. For that the said plaintiff and defendant made their certain agreement in writing on the 5th day of July, in the year of our Lord one thousand eight hundred and seventy nine, which said agreement is in the words and figures following, that is to say : Agreement made on the fifth day of July, A. D. 1879, between Will. Calvin Raworth (meaning the said defendant), and Edwin Brownell (meaning the said plaintiff). Brownell (meaning the said plaintiff), agrees to take a deed of the property conveyed by him to Raworth (meaning the said defendant), subject to the mortgages to Eliza Brownell and John Brownell, and Raworth (meaning the said defendant), is to pay Brownell (meaning the said plaintiff), \$325 ; and Raworth (meaning the said defendant), is to pay the note to Wood for \$400. It is further agreed that Raworth (meaning the said defendant), shall remain on the property until the first day of December next, and take out the crop, at which time he is to quit the property and give the possession to the said Brownell (meaning the said plaintiff). Raworth (meaning the said defendant), agrees to use the property reasonably, doing no damage beyond reasonable wear and tear. It is also agreed that the said Raworth (meaning the said defendant), is to leave on the place on the first of said December, two of the cows he now has on the place, five

1881. sheep, the threshing machine and thresher on the place, the double
 BROWNELL wagon on the place, a sled, and two lead pans, and a hay fork. Ra-
 v. worth (meaning the said defendant), is to give the deed within a fort-
 RAWORTH. night from this date, July 5th, 1879.

Witness, A. J. SMITH.	{ (Signed,)	EDWIN BROWNELL.
	{ (Signed,)	W. C. RAWORTH.

And although the said Edwin Brownell hath always and at all times, since the day of the date of said above-mentioned agreement, been ready and willing to take and accept a deed of said property mentioned in said agreement from the said William Calvin Raworth, subject to the mortgages to Eliza Brownell and John Brownell, as mentioned, and although the said William Calvin Raworth remained upon said property mentioned in said agreement, until the first day of December next after the date of said agreement, and took out his crop thereon, yet the said William Calvin Raworth has not given a deed of said property according to his promises and undertakings, in said agreement specified, but has wholly omitted, neglected, and refused, and still omits, neglects, and refuses to give to the said Edwin Brownell a deed of said property, as mentioned in said agreement, subject to said mortgages as aforesaid, according to the form and effect of his promises and undertakings in said agreement mentioned; and the said William Calvin Raworth did not give nor quit the possession of the said property, mentioned in said agreement, as having been conveyed by the said Edward Brownell to the said William Calvin Raworth, on the first day of December, in the year of our Lord one thousand eight hundred and seventy-nine, or at any other time before or since, but neglected and refused so to do, and still neglects and refuses so to do, and the said William Calvin Raworth did not use the said last mentioned property reasonably, and did do damage to the said last mentioned property beyond reasonable wear and tear, and the said William Calvin Raworth did not leave on the said last mentioned property on the said first day of December, or at any time before or since, two of the cows he had on the place or property last aforesaid, at the time of making said agreement, nor five sheep, nor the threshing machine or thresher, which was on the said property or place at the time of making said agreement, nor the double wagon which was on the said property or place at the time of making said agreement, nor a sled, nor two lead pans, nor a hay-fork, according to his said several promises and undertakings in that behalf, in said agreement mentioned, but wholly omitted and neglected so to do, and still omits and neglects so to do. By means whereof and by force of the Statute in such case made and provided, an action hath accrued to the said Edward Brownell, on occasion of the not performing by the said William Calvin Raworth of his said several promises and undertakings, and the plaintiff claims five thousand dollars damages."

To this declaration the defendant demurred, and assigned as grounds for demurrer "that the said declaration does not dis-

close any consideration for the making of the promises therein alleged to have been made on the part of the defendant."

Joinder thereon.

February 8. *A. G. Blair*, in support of the demurrer. The plaintiff is to do nothing. There is clearly no consideration: *Aldrich v. Cooper*;¹ 2 Wash. R. P. 112; *Strong v. Converse*;² *Drury v. Tremont Improvement Co.*;³ *Billinghurst v. Walker*;⁴ *Tweddell v. Tweddell*.⁵

[PALMER, J., refers to *McPhelim v. Weldon* as to liability of purchaser of an equity of redemption being bound to pay off the mortgage.]

D. L. Hanington, contra. If it may be prejudicial to plaintiff it is enough. Plaintiff agrees to take a deed; he would be bound to do it. We were bound to take a deed within a fortnight, which defendant agrees to give. Taking the deed, subject to two mortgages might be very prejudicial to the plaintiff. Prejudice to the plaintiff would be a good consideration. The parties have manifestly fixed the value of such prejudice by defendant agreeing to pay plaintiff so much cash, and to pay Wood \$400. The authorities cited on the other side do not interfere with my contention that there were mutual promises here;—two on the part of the plaintiff,—one to take the deed subject to the mortgages; the other to make defendant his tenant. *Hitchcock v. Coker*;⁶ *Bolton v. Madden*;⁷ *Bainbridge v. Firmstone*.⁸ *Cheale v. Kenward*;⁹ Chit. Contr. (10 ed.) 29; Add. Contr. 12, 13.

Blair, in reply. Substantially the argument of the other side rests on the first clause of the agreement; but it is nothing more than an agreement to accept a gift. He does not agree to pay anything for it. [PALMER, J. Is it not the same as if plaintiff had agreed to accept a conveyance of this property?] Yes, but it is nothing more than a gift after all. Feeling this my learned friend contends that the land being subject to mortgages, it imposes a burthen on the plaintiff. But I say no authority can be cited to shew that plaintiff, under this agreement, would be under any personal liability to pay the mortgages.

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¹2 Wh. & Tind. L. C. (4 Am. ed.) 241, 246.

²8 All. (Mass.) 550.

³13 All. 171.

⁴2 Brown's Ch. Cas. . 604, 608.

⁵Id. 101, note 2, 104, 106, 152.

⁶6 Ad. & E. 438.

⁷L. R. 9 Q. B. 55.

⁸8 A. & E. 743.

⁹8 DeG. & J. 27.

1881. In *McPhelim v. Weldon*,¹ the mortgagee himself purchased the equity of redemption; the reason of the decision was that BROWNELL he bought the equity of redemption, and took the property, v. RAWORTH. subject to pay the mortgages. *In re Beckwith*.²

Cur. adv. vult.

The following judgments were now delivered.

ALLEN, C. J. The declaration in this case sets out an agreement in the following words:

"Agreement made the 5th day of July, 1879, between Wm. Calvin Raworth (defendant), and Edwin Brownell (plaintiff). Brownell agrees to take a deed of the property conveyed by him to Raworth, subject to the mortgages to Eliza Brownell and John Brownell; and Raworth is to pay Brownell \$325, and Raworth is to pay the note to Wood for \$400. It is further agreed that Raworth shall remain on the property until the 1st day of December next, and take out the crop, at which time he is to quit the property and give the possession to the said Brownell."

It then stated that Raworth was to use the property in a reasonable manner, and leave certain stock upon it on the 1st December, and concluded as follows: "Raworth is to give the deed within a fortnight from this date."

The declaration averred that though the plaintiff had always, since the date of the agreement, been ready and willing to accept from the defendant a deed of the property mentioned, subject to the mortgages; and though defendant remained upon the property until the 1st December, and took the crop, yet the defendant had neglected and refused to deliver the plaintiff a deed of the property.

The question is, whether a sufficient consideration appears, to support the agreement.

The general rule is, that an executory agreement, by which the plaintiff agrees to do something on the terms that the defendant agrees to do something else, may be enforced, if what the plaintiff has agreed to do, is "either for the benefit of the defendant, or to the trouble or prejudice of the plaintiff." Com. Dig. "*Action on the Case upon Assumpsit*" (B. 1.), *Bolton v. Madden*.³ A sufficient consideration may arise, either by reason of a benefit resulting to the party promising by the act of the promisee, or by reason of the latter sustaining any loss or inconvenience, or subjecting himself to any charge or obliga-

¹ 15 ALL. 268.

² 5 ALL. 365.

³ L. R. 2, Q. B. 55.

tion, however small the benefit, charge, or inconvenience may be: Chit. Con. (8th ed.) 20.

The case of *Bainbridge v. Firmstone*¹ is an instance of the great liberality exercised by the courts in the application of the above rule. In that case, the declaration stated that in consideration that the plaintiff at defendant's request, had consented to allow defendant to weigh two boilers of the plaintiff, the defendant promised to give them up after the weighing, in as good condition as they were in at the time of the consent: breach, that defendant did not give up the boilers, &c.; it was held that there was a sufficient consideration. Lord Denman said:

"The defendant had some reason for wishing to weigh the boilers, and he could do so only by obtaining permission from the plaintiff, which he did obtain by promising to return them in good condition."

And Patteson, J., said:

"I suppose the defendant thought he had some benefit; at any rate there is a detriment to the plaintiff from his parting with the possession for ever so short a time."

The declaration in the present case, does not allege, as in *Bainbridge v. Firmstone*, that the plaintiff's agreement to take the deed was made at the request of the defendant, and this omission has caused some doubt as to the sufficiency of the declaration. The agreement is certainly somewhat obscure; but if in a case where the promises are express, it is essential to the validity of the plaintiff's promise, that it was made at the request of the defendant, I think this is a case in which a request might be implied. If so, it may be said that the defendant had some reason for wishing the plaintiff to take a conveyance of the property, and in that case, it would be assumed that his doing so would be some benefit to the defendant. But even if this were doubtful, I think it might reasonably be presumed that a person who agrees to take a conveyance of property subject to a mortgage, necessarily makes himself liable to some charge or inconvenience. Therefore, that which the plaintiff agreed to do, was either a benefit to the defendant, or a trouble or loss of some kind to himself: either of which would be a sufficient consideration to support the agreement.

I think the plaintiff is entitled to judgment.

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DUFF, J. I have not been able to give this case the consideration I would like to have done, and I have some doubts as to the sufficiency of the declaration. But my brethren being both agreed upon the question, it would be both useless and improper to delay the delivery of judgment; and I do not regard my doubts as sufficient to justify me in dissenting from their judgment.

There may have been a perfectly good consideration for the agreement, had it been shewn; but this is a question of pleading. And it occurred to me that the absence of any averment of a request on the part of the defendant, might distinguish this case from *Bainbridge v. Firmstone*, to which his Honor the Chief Justice has referred. There may have been circumstances in the case from which, without altering or adding to the terms of the written agreement, the law would imply a request; had they been set forth by way of inducement. And then the compliance with such implied request of the defendant, by the plaintiff, might constitute a sufficient consideration to support the defendant's promise. But in the absence of any express averment of a request, or of any circumstances from whence one might be implied, I certainly am not entirely free from doubt on this question.

PALMER, J. The only ground of demurrer in this case is the alleged want of consideration shewn in the written agreement, set out in the declaration.

As this relates to an interest in land, it is within the Statute of Frauds, therefore a sufficient consideration must appear on its face to support it; for if it does not, then the agreement, or what is the same thing, the whole of it, is not in writing. The only consideration so appearing, moving from the plaintiff, is a promise that he would accept a deed of certain property mentioned in the agreement, which was subject to certain mortgages, and thereafter allow the defendant to have the beneficial occupation thereof for some months; and the sole question in the case is whether this is a sufficient consideration for the defendant's promise. I think it is. I think I may say, in the language of Lord Denman in *Bainbridge v. Firmstone*, the defendant had some reason for wanting the plaintiff to accept whatever title he had of the premises that the plaintiff agreed to accept,

and for himself to be allowed the use of such premises for the time stipulated with the title in the plaintiff, when he could only do so by getting the plaintiff's consent, which he got by promising him what he did by this agreement. And we need not inquire what benefit he expected to derive. The plaintiff might have refused his consent. And in *Williams v. Clark*¹ it is laid down that any act which is a detriment to the plaintiff, or a benefit to the defendant is a sufficient consideration.

It follows that the demurrer must be overruled.

Judgment for plaintiff.

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[Crown case reserved.]

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April.

[Full Court, before ALLEN, C. J., and WELDON, WETMORE, DUFF and KING, JJ.]

Criminal Law—Acts of Canada 32 & 33 Vic., c. 21—Larceny of an unstamped promissory note—Whether “valuable security” within the meaning of the Act.

Held, (by ALLEN, C. J., DUFF and KING, JJ., WELDON and WETMORE, JJ., dissenting,) that an insufficiently or defectively stamped promissory note, the holder being ignorant of the insufficiency of, or defect in, the stamping, may be the subject of larceny, as a valuable security, under the Act 32 & 33 Vic., c. 21, s. 15.

This case was reserved by Mr. Justice Duff. The prisoner was indicted at the Carleton Circuit for stealing a promissory note. The note was not stamped and cancelled, but it appeared on the trial of the indictment that before the note was stolen, the prosecutor was not aware of the defect. The Judge allowed the counsel for the crown to affix stamps for double duty, and the prosecutor to cancel them. The prisoner was convicted, and the point reserved was whether, under the circumstances above detailed, he was rightly convicted.

February 10. *Geo. F. Gregory*, for the prisoner, contended that an unstamped promissory note could not be the subject of larceny as a promissory note. The prisoner might have been convicted of stealing the paper and stamps, but not of stealing the note, the note being a void instrument and incapable of being afterwards made good so as to make the taking of it larceny. The taking must be a felony at the time. No subse-

¹ 11 Taunt. 523.

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quent act of the prosecutor can make it a felony. He referred to *Reg. v. Lowrie*; ¹ *Reg. v. Yates*; ² Roscoe Crim. Ev., (ed. of 1875,) 235; *Rex v. Hart*; ³ 2 Russ. Crimes, 223; and *Perry's Case*. ⁴

Fraser, A. G., for the Crown, contended that the note although unstamped, was none the less a promissory note; and that it was valid until the holder was in default by failing to stamp it properly when the fact of its being defectively stamped came to his knowledge. It was a valuable security at the time it was taken, and the prisoner was rightfully convicted. He referred to Ros. Crim. Ev., (ed. 1835), 164, and 2 East's Pleas of the Crown, 955, 956, and cases there cited.

Gregory, in reply.

Cur. adv. vult.

The following opinions were now delivered:

KING, J. The prisoner was tried at the last Carleton Circuit on an indictment charging him with stealing from one Gardiner, the prosecutor, a promissory note made by the prisoner in favor of the prosecutor.

At the time of the alleged larceny the note was insufficiently or defectively stamped, but this was not known to the prosecutor until upon the trial, when the note was produced by the prisoner's counsel on the cross-examination of the prosecutor. The counsel for the crown then applied for and obtained leave for the prosecutor to affix double stamps, which was done, and the note was received in evidence. The prisoner was found guilty and the learned judge has reserved for our consideration the question whether, on these facts, the conviction can be sustained. It is contended on the part of the prisoner that an unstamped promissory note is not the subject of larceny as a valuable security under the Act 32 & 33 Vic., c. 21, sec. 15, and that the only indictment maintainable would be an indictment charging the stealing of the instrument as a piece of paper, or charging the stealing of the stamps affixed to the note.

I am of the opinion that the conviction should be affirmed.

A chose in action being an incorporeal right, is of course, not the subject of larceny, and at common law no instrument that

¹ 2 L. R. 1 C. C. R.
² 1 M. C. C. 170.

³ 6 C. & P. 106.
⁴ 1 C. & K. 726.

is simply evidence of a chose in action,—as, for example, a bill of exchange, promissory note, or agreement,—is the subject of larceny. Nor is such an instrument a subject of larceny as a mere piece of paper, there being at common law two exceptions, viz.: muniments of title to land, (*Rex v. Westbeer*,¹) and bills of exchange, promissory notes, agreements in writing, and other instruments which are evidences of a right resting in contract: Byles on Bills, 178, in notes. The effect of this was that whilst an indictment for larceny might be sustained in respect of a piece of paper whether blank or otherwise, if of any, even the least appreciable value, to the owner, although of no value to any one else, yet if the same paper had written upon it words which made of it a promissory note, it was at common law not the subject of larceny either as a promissory note or as a mere piece of paper.

This unsatisfactory state of the law was first altered in England by the Act 2 Geo. 2, c. 25, and the state of the law on this point is now declared there by the larceny Act 24 & 25 Vic., c. 96, sec. 27, and in this country, by the 32 & 33 Vic., c. 21; by section 15 of which latter Act it is enacted that whosoever steals any valuable security * * * is guilty of felony of the same nature and in the same degree, and punishable in the same manner as if he had stolen any chattel of like value * * * with the money due on the security so stolen or secured thereby and remaining unsatisfied. And by section 1 the term valuable security is, for the purposes of the Act, to be interpreted as including, amongst other things, bills, notes, or other securities for money; and it is declared that every such security shall, where value is material, be deemed to be of value equal to that of the unsatisfied money for the security of which it is applicable.

To bring a case within the statute it is necessary then that the instrument should be a valuable security, and (if a security for money) that there should be money due on the security, or secured thereby and remaining unsatisfied.

In the first place, the instrument must be a valuable security within the meaning of the Act. A bill or note is such a security, but if the bill, note, or other security is imperfect or incomplete

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1881. it is not within the Act. This was the case in *Reg. v. Hart*,¹
 THE QUEEN cited by Mr. Gregory. The instrument there was alleged to
 v. be a bill of exchange, but at the time of the alleged larceny, it
 DEWITT. contained neither the name of a drawer nor any amount, and
 so, being incomplete as a bill of exchange, it was held not to
 be the subject of larceny as a bill of exchange.

And, in the next place the instrument must be of value to the holder, as an existing security for money remaining due on it, and accordingly, if a bill or note is taken (under circumstances otherwise amounting to larceny) from the acceptor of the bill, or from the maker of the note, it is not within the Act, for the reason that there can be nothing due to the acceptor or maker upon his own acceptance or promise. The bill or note is simply an evidence of his own liability, and, as to him, is no security at all. And this was the case of *Scott v. The Queen* decided in the Supreme Court of Canada in 1878. So if the bill or note were paid, or if it were by statute or otherwise rendered invalid, either generally or as to the prosecutor, it would not be within the Act, as there would be no money due to the prosecutor upon the security of it. The cases of *Reg. v. Yates*,² and *Reg. v. Perry*,³ cited by Mr. Gregory, where unstamped cheques were held not to be the subject of larceny, are instances of this.

The question whether a particular instrument is or is not within the Act is to be determined by the state of facts existing at the time of the alleged larceny, for the guilt or innocence of the prisoner is not to be dependent upon what may or may not be done subsequently in respect of the instrument.

Now what is the instrument here? It is the absolute promise in writing (not under seal) of the prisoner to pay to the prosecutor or order a sum certain at a time certain. It is therefore a promissory note according to all the accepted definitions of a promissory note; and it is because of its being a complete promissory note that it is subject to the requirements of the Stamp Act, and that it is to be declared on as a promissory note in any action brought on it by the innocent holder.

In a case, to which I shall presently refer more at length, where the question was whether an agreement unstamped at

¹ 6 C. & P. 106.² 1 Moo. C. C. 170.³ 1 C. & K. 725.

the time of the alleged larceny, but capable of being made available by subsequent stamping and payment of penalties, was an agreement, or was to be treated in an indictment for larceny, as contended here, simply as a piece of paper, Platt, B., said :—

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“If an action were brought on this instrument the declaration and all the pleadings would describe it as an agreement. It would surely be strange to hold it was no agreement until it was stamped, when the necessity for a stamp arises from its being an agreement.”

And in *Bradley v. Bardsley*,¹ Parke, B., in reply to a statement of counsel that an unstamped agreement was not a complete instrument said :—

“The word complete cannot be taken to include the stamping.”

But it is said that the Stamp Act has made this note invalid even in the hands of an innocent holder. I do not think so. From an early time, general words in Stamp Acts declaring instruments to be invalid have been accustomed to receive a restrained application. Thus in *Crossley v. Arkwright*,² Buller, J., said :—

“The Stamp Acts are mere revenue laws. There are clauses in some of the old ones to enable the party who has made a contract on unstamped paper to get it stamped after it is made on paying a certain penalty. Now all these Acts being made in *pari passu* must be taken together, and though they say that such a paper shall be void yet they make provision to make it good, and therefore if it be stamped at the time it is produced it is sufficient.”

Now our Stamp Act not only makes provision by the 13th section for double stamping by an innocent holder, but it also, in the 12th section, expressly excepts the innocent holder from the penalties imposed and expressly excepts him from the operation of the clause rendering the instrument invalid. And not only so, but in the clause in which the unstamped instrument is declared invalid, the non-payment of double duty in cases where double duty is payable, is made the necessary condition to the invalidation in such cases. It seems to me therefore to be clear that it is only when the innocent holder ceases to be an innocent holder by committing a breach of the revenue laws in neglecting to pay the double duty, after acquiring a knowledge of the defect in the stamping, that the instrument becomes as to him, invalid. Previous to such default it is, as to him,

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a valid instrument, but subject to be defeated by his non-compliance with the requirements of the Act.

Now, what are the rights of the holder of an unstamped note who has no knowledge of the defect? In the first place, he has a good and complete cause of action in respect of the note, and may sue upon it at once if not paid according to its tenor. The existence of the right of action is contemplated by the Act for it contemplates an action, and makes provision for the stamping by payment of double duty, even on the trial.

In the next place the action so brought cannot be defeated by a plea that the note is unstamped. It would be otherwise if the Act did not provide for the subsequent stamping. The distinction is between instruments which have been rendered invalid by the default of the holder, and instruments in which there has been no breach of the Act by the holder, but in respect of which he has still the power of stamping. In the former case the want of stamps may be pleaded in answer to the action; in the latter case it cannot be so pleaded. Thus, in *Bradley v. Bardsley*,¹ to an action on a promissory note by the payee against the maker, it was pleaded that the note was altered after the making, without being restamped as required by the Stamp Act. On demurrer it was held that the plea was no answer to the declaration inasmuch as the stamp laws authorized the stamping of certain kinds of notes before the trial, and the plea did not show that this was not one of these cases.

Parke, B., said:—

“If the stamp laws can be pleaded in bar of an action it can only be in cases where the instrument cannot be made good by being stamped before the trial. * * * The only allegation is that the instrument was not restamped, but it might, for aught that appears in the plea, be stamped before the trial; and that being the case, the plea affords no answer to the declaration,”

Alderson, B., said:—

“If the law were that no promissory note could be enforced unless it were stamped at the time of making it, the plea would afford a good answer to the declaration. But inasmuch as the note in this case may, for aught that appears, be made good by being stamped subsequently to the alteration, it is no answer to say that after the note was made it was altered without being restamped.”

And Rolfe, B., said:—

¹14 M. & W. 878.

"The plea ought to have shut out every defence of that nature and have shewn that under no circumstances could the note in this case have been made available."

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It follows from this, that inasmuch as our Stamp Act allows an innocent holder to avail himself of an unstamped promissory note by paying double duty when first he acquires knowledge of the defect, the prisoner here, if, at the time of the alleged larceny, he had been sued by the prosecutor upon this note, could not have set up in answer to the action, what he here seeks to set up, viz.: that by reason of the note not being properly stamped, although the prosecutor had no knowledge of the defect, the note was not then a valid security upon which money was due from him to the prosecutor.

It seems to me then that all the requirements of the Larceny Act 32 & 33 Vic., c. 21, sec. 15, are fully met. Can it be said that the instrument is not a promissory note when it gives a right of action, and may be sued on and declared on as a promissory note? And can it be said that at the time of the alleged larceny there was no money due on it and remaining unpaid, because of its being unstamped in the hands of an innocent holder, when such facts would constitute no defence to the maker in an action by the innocent holder? While the note still exists as a good cause of action to the innocent holder, and while as yet it is unimpeached in his hands by any breach by him of this revenue law it is a note on which money is due to such holder, and if so, it is within the Larceny Act; and it seems to me that a note can hardly be called invalid which is valid enough to confer a right of action, to which the fact of its not being stamped in the hands of an innocent holder, furnishes no defence. Nor does the fact that the holder may, by his subsequent breach of the law, lose his rights and affect the previously existing state of facts on which alone this matter is to be determined. The case of *Reg. v. Watts*, decided in 1854, and reported in 23 L. J., M. C. 56 and in 6 Cox, 304, is an authority for this view. This is the case to which I before alluded. The prisoner was convicted on an indictment charging him with stealing a piece of paper; the paper purported to be an unstamped building agreement made between the prisoner and the prosecutor, which by the English Stamp Act was required

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to be stamped, but which, according to the Stamp Act, might be stamped at any time before trial on payment of certain penalties and duties, and so made effectual. It was contended there, on behalf of the Crown, as it is here contended on behalf of the prisoner, that as at the time of the alleged larceny the agreement was not available as an agreement, by reason of its being unstamped, it was therefore not a valid and subsisting agreement, and that consequently the paper on which it was written was as a *mere piece of paper*, the subject of larceny; and with this view Baron Parke agreed, and was of opinion that the prisoner might well be convicted of stealing the instrument as a piece of paper, because that although capable of being made evidence of an agreement by subsequent stamping, it was not at the moment of the taking, any evidence of an agreement. But all the other judges, viz.: Lord Campbell and Alderson, Martin and Platt, BB., and Coleridge, Maule, Wightman, Cresswell, Williams and Crompton, JJ., held that the prisoner could not on these facts be convicted of stealing a piece of paper because that being capable of being made available on payment of penalty and duty, the document was evidence of a chose in action, and was not invalid. Lord Campbell said:—

“If the agreement had been stamped an indictment for stealing the piece of paper could not have been supported, for the agreement would then have been a chose in action, or more strictly the evidence of a chose in action. It was urged that it was no agreement because it was not stamped, but I am of opinion that it was an agreement. It was capable of being made available as evidence of the rights of the parties. The distinction is clear between instruments which are *ipso facto* void, and those which can be rendered available by imposing a stamp.”

[This last passage is thus reported in Cox:—

“The distinction is between instruments which may and those which cannot be stamped after execution. In the former case the stamp laws affect the admissibility of the instrument only; in the latter its validity.”]

“It is clear that if an action were brought on an agreement, a plea that it was not stamped would be bad. If it were stamped at the time of the trial it may be given in evidence. In this case it seems to me that there was a potentiality of making the document evidence of a chose in action. It comes therefore within the rule as to choses in action, and the conviction is bad.”

[The closing passage is thus reported in Cox:—

“I agree that we must look at the state of the instrument at the

time of the larceny committed, but it then had a potentiality of being made available."]

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And Alderson, B., said :—

"You may bring an action on an unstamped agreement, and stamp it on the trial, and it cannot be alleged that the action is brought before the agreement is made or the cause of action has arisen. The document exists as an agreement, though unstamped."

Coleridge, J., said :—

"It is true it was not at the time available in evidence, but it was capable of being completed by adding a stamp ; but it could not have acquired a new character by reason of the stamp."

And Platt, B., as reported in Cox, used the language before quoted.

Upon the authority of this case therefore I think that the instrument in question here, although unstamped, was a promissory note ; and that if the prisoner had been charged, as suggested, upon an indictment for stealing the instrument as a mere piece of paper, the conviction could not have been sustained.

The cases of *Reg. v. Yates*,¹ and *Reg. v. Perry*,² were cited by Mr. Gregory as shewing that unstamped checks were held not to be a subject of larceny under the Act. But these cases are distinguishable and really confirm the view here taken, because as stated by Alderson, B., in the course of the argument, in *Reg. v. Watts*, an unstamped cheque could not afterwards be made available as a cheque. It could not be subsequently stamped, but was wholly unavailable and void.

In the view here taken, it is wholly immaterial whether or not the note is stamped subsequent to the larceny. The larceny is complete with the taking of a promissory note upon the security of which at the time of the taking there was money due to the holder, and the subsequent double stamping does not make the taking larceny, nor does a subsequent omission to stamp deprive the taking of its felonious character.

I may add that it was not necessary for the purposes of this trial to stamp the note on the trial. It was not necessary in order to constitute the offence, for if it was not larceny before the double stamping it could not be made so by the voluntary act of the prosecutor. Nor was it necessary for purposes of

¹ Moo. C. C. 170.

² 1 C. & K. 325.

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evidence, as the statute now makes unstamped instruments evidence in criminal cases. For these reasons I think the conviction should be affirmed.

With regard to *Hawkswood's Case* and *Morton's Case*, referred to in argument, I may add that the doctrine of these cases was never extended beyond cases of forgery. They were made to rest on the character of the offence, which consists in simulating a document, and which presupposes its falsity. Another reason might be given, viz: that the Stamp Acts are made for true and not for false instruments. But apart from cases of forgery and cases where the document was merely collateral to the prosecution, it was settled law prior to the Act authorizing the admission of the evidence of unstamped documents in criminal cases that in this respect the Stamp Acts were as applicable to criminal as to civil proceedings. This was declared to be the law in *Reg. v. Gompertz*.¹

Mr. Justice Duff authorizes me to state that he concurs in this judgment.

WETMORE, J. The prisoner was indicted for stealing a promissory note, and convicted thereof. I agree with my brother Weldon, that the conviction should not be sustained, by reason of the defect in the stamping the instrument alleged to have been stolen. Section 12 of 42 Vic., cap. 17, after declaring the penalty for not affixing proper stamps, duly initialed, at the proper time, proceeds:—

“And save only in the case of payment of double duty as in the next section provided, such instrument shall be *invalid and of no effect in law or in equity*, and the acceptance or payment or protest thereof shall be of no effect.”

The defectively stamped note was not to my mind such an instrument as was capable of being the subject of larceny as a promissory note. It was legally valueless as a promissory note under the Stamp Act. Section 13 enables an innocent holder of an unstamped note to make it valid by the doing of certain specified requirements. This, I apprehend, only applies to civil rights, and cannot affect any criminal proceeding, otherwise the conviction for larceny might depend upon whether the note was held by a party innocent, or not so, of the want of or de-

¹ 9 Q. B. 824.

fect in its stamping. The instrument being by law utterly valueless, I am at a loss to see how it could be the subject of larceny. By cap. 21 of 32 & 33 Vic., sec. 2,—

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“Every larceny, *whatever be the value* of the property stolen, shall be deemed to be of the same nature and shall be subject to the same incidents in all respects as grand larceny was, before the distinction between grand and petit larceny was abolished.”

The words “*whatever be the value*” would seem to imply the necessity of some value. The value, after this statute, may not be material—that is the extent of value—still where the law expressly declares the article to be of no value, how can an indictment for larceny be sustained? If no larceny was committed by the prisoner at the time of the taking, by the appropriation of the article, the felony cannot be perfected by something, such as affixing stamp, done by some one else after the taking is complete, any more than if a person appropriate an animal *feræ naturæ*, not the subject of larceny, could be liable for larceny by the subsequent taming of the animal.

The prisoner is indicted and convicted for stealing a promissory note. Was what the prisoner appropriated a promissory note? A promissory note is a written promise for the payment of moneys requiring certain requisites. Did this note—defectively stamped—contain a promise? Must not the document contain a promise—a *binding promise*—and what possible binding promise is there where the law says the document is invalid, and of no effect in law or in equity: in other words, utterly valueless in its then state.

By the first section of cap. 21 of 32 & 33 Vic., an Act respecting larceny and similar offences, a valuable security is defined as including any debenture, deed, bond, bill, note, warrant, or *other security whatsoever for money*, or for payment of money. By section 15, as to larceny of written instruments, it is enacted that whoever steals, or for any fraudulent purpose destroys, cancels, obliterates or cancels, the whole or any part of any valuable security, is guilty of a felony. Section 1 speaks of, and only extends to, a document *that is security for money, or payment of money*. Now what security for money or for payment of money is a written paper unstamped or improperly stamped, which the law declares to be invalid, and of no effect

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in law or in equity, and the payment of which is prohibited under a penalty? The term "writing" has its legal definition by section 1. It includes any mode in which, and any material on which, words or figures at length or abridged, are written, printed, or otherwise expressed, or any map or plan is inscribed. To indict and convict a prisoner for stealing a writing is one thing; for stealing a promissory note, quite another. The prisoner might well have been convicted for stealing the paper, and the defective stamp, or either of them, or of stealing a writing,—but the indictment specifies what the party is charged with stealing. The indictment charges stealing a promissory note, and the prisoner is convicted as charged, when the document he appropriated was of no value. It contained no promise. Its payment is prohibited under a penalty; and, besides the payment would have been of no effect by the Stamp Act. And I think in law it had no existence as a promissory note or valuable security in the state it was when appropriated by the prisoner.

WELDON, J. The defendant was convicted and found guilty at the Carleton Assizes, holden in November last, before Mr. Justice Duff. A question of law was reserved,—whether he was rightly convicted of the offence charged.

The defendant was indicted under 32 & 33 Vic., cap 21, sec. 15, for stealing a promissory note, dated 30th March, 1880, payable to Bradford Gardiner, eight months after date, for \$45. The note, when produced, had the proper stamps. The prisoner had made his mark to the note, but there was no obliteration of the stamp. A person of the name of Quin said he had written the note, and saw the defendant's mark made thereto. There were no stamps on the note when it was made; he put the stamp thereon afterwards. It being objected by the prisoner's counsel that the note was void for want of being stamped at the proper time, the prosecuting officer was allowed to add double stamps at the trial to make the note valid, under the 13th section of chap. 17, 42 Vic., upon which the prisoner was found guilty. The section reads:—

"Any holder of such instrument, including banks and brokers, may pay double duty by affixing to such instrument a stamp or stamps to the amount thereof, or to the amount of double the sum by which the

stamps affixed fall short of the proper duty, and by writing his initials on such stamp or stamps, and the date on which they were affixed; and where in any suit or proceeding in Law or Equity, the validity of any such instrument is questioned, by reason of the proper duty thereon not having been paid at all, or not paid by the proper party, or at the proper time, or of any formality as to the date or erasure of the stamps affixed, having been omitted, or a wrong date placed thereon, and it appears that the holder thereof, when he became such holder, had no knowledge of such defects, such instrument shall be held to be legal and valid, if it shall appear that the holder thereof paid double duty as in this section mentioned, so soon as he acquired such knowledge; even although such knowledge shall have been acquired only during such suit or proceeding."

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This section, it appears to me, was never intended to apply to a criminal proceeding where a party is charged with stealing a promissory note in form, but not properly stamped; and therefore the double stamping by the Crown, or prosecuting officer at the trial, was not authorized by or made valid by this section. Neither the Crown nor the prosecuting officer could, under this section, be considered the holder thereof, nor could any act by them make the note valid at the time of the stealing thereof, it being of no more value when stolen than the paper on which it was written. It could not be recovered on at law in the state it was then in, nor unless it was double stamped.

How can it be contended that the double stamping at the trial, long subsequent to the taking, which constitutes the alleged larceny, and wholly unconnected therewith, can make it larceny to take that which was not of any value, nor a valuable security, within the meaning of the Statute. It is clear that under the Stamp Act the note was of no value either at law or in equity. This paper, though in form of a promissory note, did not in any way change or alter the relative position of the parties in respect thereto, or their relative rights or obligations.

The case of *James Scott v. The Queen*,¹ is conclusive to my mind to shew this conviction cannot be sustained. All the cases bearing on the question are referred to in that judgment. The double stamping at the trial, doubtless had its effect upon the mind of the jury, and being improperly allowed, I am of opinion this conviction should be quashed on this ground, if there were no other. The adding double stamps in civil actions to make a note valid, is only allowed under statutory authority.

¹ 2 Sup. Court of Can. Rep. 349.

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No authority can be found in any criminal code to authorize the Crown, through the prosecuting officer, as an innocent holder, to place double stamps on a promissory note.

I am therefore of opinion this conviction ought not to stand.

ALLEN, C. J. I think the conviction in this case should be sustained.

The Statute under which the prisoner was convicted is the 32 & 33 Vict., c. 21, and the sections bearing on the question, are the first and fifteenth.

The fifteenth section declares that whosoever steals *any valuable security*, other than a document of title to lands, is guilty of felony, and punishable in the same manner as if he had stolen any chattel of like value with the money due on the security so stolen, or secured thereby, and remaining unsatisfied.

The first section declares that the term "valuable security" shall include (*inter alia*) "any debenture, deed, bond, bill, note, order, or other security whatsoever, for money or for payment of money."

Then, was the instrument in question here, at the time it was taken by the prisoner, a note, or security for the payment of money? I entirely agree with my brothers Weldon and Wetmore that unless it was so, the conviction is bad; and that no act of the prosecutor, subsequent to the taking can affect the prisoner's liability.

I think the cases of *Bradley v. Bardsley*¹ and *Reg. v. Watts*,² which have been fully considered by Mr. Justice King are decisive on the point whether it was a promissory note. They decide that a document of this kind, though unstamped, is nevertheless a promissory note, and capable of being made available as evidence of the rights of the parties; though whilst unstamped, it cannot be given in evidence. It becomes a note the moment it is signed and delivered to the payee, as security for the payment of a sum of money due to him by the maker. It was unnecessary, by the 19th section of the Stamp Act (42 Vic., c. 17), to affix double stamps upon the note before putting it in evidence.

The case of *Scott v. Reg.*³ is clearly distinguishable from this case. There, the document at the time the prisoner stole it,

¹14 M. & W. 873.

²18 Jur. 102.

³28 Sup. Court, R. 340.

was neither a promissory note, nor a security for the payment of money, nor a contract of any kind, nor was it intended so to be, nor ever to have a stamp affixed to it: it was, in fact, of no value whatever, except as a mere piece of paper. It was for these reasons that it was held that the prisoner could not be convicted on an indictment charging him with stealing a "note" for the payment of a certain sum of money. That is all that is needed in that case.

DUFF, J., concurring with the Chief Justice and Mr. Justice King,

Conviction affirmed.

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McMILLAN v. WALKER, ET AL.

[2nd Division, before WELDON, FISHER,¹ and WETMORE, JJ.]

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Negligence of Contractor—Liability of employer—Bye-Law retrospective operation of—Reading statement of former witness to witness to contradict—Several defendants appearing by same attorney—Separate counsel on trial—Right to address jury.

S. contracted to erect a building for W. on his (W.'s) land. W. engaged B. to superintend the erection—his duty being to enforce the conditions of the contract, furnish drawings, &c., make estimates of the amount due, and when the building was completed to issue a certificate which, if unconditional, would be an acceptance of the contract. W. also reserved the right to alter or modify the plans and specifications and to make any deviation in the construction, detail, or execution of the work without avoiding the contract, and in case of unnecessary delay, or of the inability of S. to perform the work within a given time, W. might, on giving notice in writing, take possession and carry on the work to completion, charging the same to S. The building to be at the risk of S. until accepted by W.

Held, per WELDON, J., that by the terms of the contract W. retained control over the work, and was liable for an injury to the plaintiff's building, which was the result of S.'s improper and careless execution of the contract.

Per WETMORE, J., that W. was not by the terms of the contract liable for the injury, and if it was sought to make him liable on the ground that he interfered and controlled S. in the execution of the work, that was a question for the jury.

A contract was made on the 26th September to erect a proper and legal building in the city of Saint John. Two days afterwards a bye-law of the city was passed prohibiting the erection of buildings such as the one contracted for and declaring them to be nuisances.

Held, per WELDON, J., that the bye-law avoided the contract, and a building erected under it was a nuisance. Per WETMORE, J., that even if the bye-law did make the building a nuisance, the plaintiff could not, under the pleadings in the case, have the benefit of it.

On the trial of the cause the Judge refused to allow defendant's counsel to read to witness B. what S. had sworn was said by him B. about making a mistake, in order to ask B. whether such statement was true or not.

¹Mr. Justice Fisher, who was present at the argument, died before the judgment was given.

1881. *Held*, per WELDON, J., that the Judge was right, and B. could only be asked to give his version of the conversation. Per WETMORE, J., that the statements which the counsel wished to read not being in themselves evidence the Judge should have allowed them to be read to the witness, for the purpose of contradiction.

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The defendants appeared by the same attorney, but were represented at the trial by separate counsel.

Held, per WELDON, J., that only one counsel had a right to cross-examine and address the jury. Per WETMORE, J., that at all events the Judge should have satisfied himself that defendants' interests were identical before refusing to allow the counsel for both to cross-examine and address the jury.

Trespass for an injury to the plaintiff's building, tried before Weldon, J., at the Saint John Circuit, in November, 1879.

The declaration contained five counts. The first count alleged that the plaintiff was possessed of a certain messuage, with the appurtenances, situate on Prince William street, in the city of Saint John, upon which he had erected a brick building, and that defendants were possessed of or in the occupation of another messuage, with the appurtenances, next adjoining to the said messuage of the plaintiff, upon which said messuage the said defendants were also erecting a brick house or building, and the said defendants, by their agents and workmen in that behalf conducted themselves carelessly, negligently, and improperly in the erection of the said building, and in consequence of such negligent and improper conduct of the defendants, their agents and servants in that behalf, in erecting the said building, and from neglecting to use reasonable and proper precautions, defendants' house fell and injured the plaintiff's, and prevented him from having the use and occupation of the same.

The second count alleged that the wall between the lots of defendants and plaintiff was a party wall, and plaintiff had a right to have his building supported by the said wall, and defendants by their carelessness and negligence, caused a quantity of bricks, mortar, and lumber to fall upon the said party wall and broke it down, together with the other walls of the plaintiff's building, and did other great damage, and prevented plaintiff from having the beneficial occupation of the said building, and plaintiff was put to great expense in building and repairing the same.

The third count alleged that the defendants suffered and permitted a large quantity of water to accumulate and lie in and upon their said building; that the said water flowed down

upon and over the defendants' building, and so weakened and undermined the walls thereof that they were thrown down upon the plaintiff's building, and injured the same.

The fourth count alleged that the walls of the defendants' building were in an insecure and improper state and in danger of falling, and defendants well knowing the premises suffered and permitted them to continue in such state until they fell upon plaintiff's building, and damaged and destroyed the same.

The fifth count alleged that defendants broke and entered plaintiff's close and placed thereon a great quantity of bricks, lumber, stone, &c.

Plaintiff claimed five thousand dollars.

The pleas to first count were:—1st. Not guilty. 2nd. Not possessed. 3rd. That defendant, Walker, had contracted with skilled and competent persons to erect a thoroughly good and substantial building; that they while in possession and erecting the same had the sole control and management thereof, and that the injury complained of happened through their neglect and carelessness and not from any default or negligence of the defendant. 4th. That it was agreed between the defendant, Walker, and the plaintiff that a party wall should be erected between the lots, to form the southern wall of the building to be erected by the plaintiff and the northern wall of the building to be erected by the defendant, Walker; that the wall should be erected strong and sufficient as a party wall; that at the time of making the said agreement plaintiff had contracted with Spears to erect a building on his lot for him, and defendant, Walker, had contracted with the said Spears to erect a building on his lot for him; that while the erection of the latter building was being proceeded with, the said contractor, without the knowledge or consent of the defendant, James Walker, placed a large quantity of sand in his building, which he intended to use in the erection of both buildings; that while the same so remained there for this purpose, it became soaked with rain, and that partly from the weight of the said sand, and the water absorbed therein, and partly by reason of the faulty construction of the said party wall, and partly through the weakness of the walls erected by the said contractor in defendant's building, the walls in the last mentioned building fell, and did

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the injury complained of, and that at the time of the placing of the said sand in the building of the said Walker, and at the time of the injury, the same was in the possession and under the control of the contractors.

The pleas to the third and fourth counts were the same as the pleas to the first. Not guilty was pleaded to all the counts. The fifth plea to second count was the same as the fourth plea pleaded to all the other counts.

The third plea to the fifth count alleged that certain competent and skilled persons were erecting a building for defendant, Walker, and at the same time a similar building for plaintiff, and that while the same were in course of erection, the plaintiff by himself, or by his servants or agents placed or caused to be placed upon the floor of defendant's, Walker's building, while it was in an unfinished and weak state, a large quantity of sand, which caused the floor and wall of defendant's building to fall and did the trespass complained of.

The provisions of the contract between the defendant, Walker, and the Messrs. Spears, the material facts and the grounds of the motion for a new trial are fully stated in the arguments of counsel and in the judgments of the Court.

The jury found a verdict for the plaintiff for \$3952.32 for damages to the building and \$1375 for the loss of the rent.

His Honor directed a separate finding as to each item, being of the opinion that the claim for loss of rent could not be recovered.

October 14 and 15. *S. R. Thomson, Q. C.*, moved for a new trial. His Honor told the jury that the defendant, Walker, retained control of the work, and it was his duty to see that it was carried out according to the contract. He founded his judgment upon clauses five and eight of the contract. Neither of these clauses would render defendants liable for an injury caused by the default of the contractor, if the act causing the injury was collateral to the contract: *Butler v. Hunter*; ¹ *Reedie v. The London and Northwestern Railway Co.* ² Under the contract the contractor was bound to construct the building in a proper and workmanlike manner, and was to be the sole judge of the amount of care and diligence required, and liable for the

¹ 7 H. & N. 823.

² 4 Exch. 244.

safety of the work. The Messrs. Spears were independent contractors and the relation of master and servant did not exist between them and Walker; they engaged the workmen and had control over them. Walker had no right to interfere with them, and would not be held liable for their acts: *Cuthbertson v. Parsons*; ¹ *Rapson v. Cubitt*; ² *Murphy v. Caralli*; ³ *Milligan v. Wedge*; ⁴ *Steel v. The South-Eastern Railway Co.* ⁵

To test the defendant, Walker's, liability it is proper to enquire whether he had control of the person causing the injury. We contend that on a fair construction of the whole contract the contractor had the control of the work, and Walker had no right to interfere with the manner in which the work should be performed. It is true that by section eight of the contract he was at liberty to make any deviation in the construction, detail, or execution of the work, and could alter or modify the style of the building as by making it a story higher or a story lower; but he was not authorized to alter the manner of doing the work. If the defendants are right in their contention that they are not liable by virtue of the contract itself there must be a new trial; for while it may be that the defendants might have so interfered as to make themselves liable, and while there may have been some evidence of such interference the evidence was by no means all one way, and the question should have been left to the jury. The question of the acceptance of the wall was also a question of fact.

The only question left to the jury was whether the wall was improperly built, and whether the injury was caused by its falling.

His Honor refused to allow the counsel for both defendants to cross-examine or address the jury, because they had appeared and pleaded by the same attorney. That fact should not make any difference, unless the defendants' interests were identical. Their interests were not identical in this case. Walker might be liable, and Sears not so, though perhaps the converse of the proposition would not be true. His Honor should at all events have satisfied himself by enquiry whether the defendants' interests were identical or not, before depriving them of

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¹12 C. B. 304.
²9 M. & W. 710.
³84 L. J. Exch. 14.

⁴1 Q. B. 714.
⁵16 C. B. 550.

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We had a right to read to Babcock what Spears had sworn was said by him (Babcock) about making a mistake, in order to ask Babcock whether such statement was true or not.

The contract between Walker and Spears was legal when entered into, and a bye-law passed subsequently would not make it illegal. The bye-law should not have been admitted in evidence under the pleadings in this case. The Act authorizing the bye-law creates a criminal offence and is *ultra vires*.

The claim for loss of rent cannot be recovered; it is too remote and there are no allegations in the pleadings to found such a claim on.

The following authorities were also referred to: *Bridges v. The Directors, &c., North London Ry. Co.*;³ *Ellis v. The Sheffield Gas Consumers Co.*;⁴ *Knight v. Fox*;⁵ *Peachy v. Rowland*;⁶ *Overton v. Freeman*;⁷ *Hilliard v. Richardson*;⁸ *King v. New York Central Ry. Co.*;⁹ *Cuff v. Newark Ry. Co.*;¹⁰ *McCafferty v. Spuyten, Duyvil Ry. Co.*;¹¹ *Angus v. Dalton*;¹² *Brackett v. Lubke*;¹³ *Murray v. Currie*;¹⁴ *Broom's Legal Maxims*, 815; 1 *Addison on Torts*, secs. 579, 580.

October 16 and 19. *Barker, Q. C.*, shewed cause. The question whether the relationship of master and servant existed between Walker and Spears depended upon the written contract, and was therefore a question for the court and not for the jury. Walker, by the contract, reserved the right to alter or modify the plans and specifications, and to make any deviation in the construction, detail or execution of the work. This does not mean, as has been argued on the other side, that Walker had only a right to modify the plans and change the style of the building, but it gives him power to control and regulate the manner of doing the work. If that is the effect of the contract, Spears would not be an independent contractor within the meaning of the authorities, and defendant would be liable for his wrongful act: *Allen v. Hayward*;¹⁵ *Hole v. The Sittingbourne and Sheerness Ry. Co.*;¹⁶ *Pickard v. Smith*;¹⁷ *Ellis v. The Sheffield Gas Company*;¹⁸ *Goram v. Gross*;¹⁹

¹³ F. & F. 859.

²⁷ C. & P. 593.

³ L. R. 7 H. L. 213.

⁴ E. & B. 767.

⁵ Exch. 721.

⁶ 13 C. B. 182.

⁷ 11 C. B. 867.

⁸ Gray, 349.

⁹ 23 Am. Rep. 37.

¹⁰ 10 Am. Rep. 205.

¹¹ 19 Am. Rep. 237.

¹² 4 Q. B. Div. 85.

¹³ 4 Allen (Mass.) 133.

¹⁴ L. R. 6 C. P. 24.

¹⁵ 7 Q. B. 909.

¹⁶ 6 H. & N. 438.

¹⁷ 10 C. B. N. S. 470.

¹⁸ 2 E. & B. 767.

¹⁹ 23 Am. Rep. 424.

Bruckett v. Lubke; ¹ *Blake v. Thirst*; ² *Sadler v. Henlock*.³

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Where an injury has been caused by the negligent performance of an act which an employer has authorized, it is not necessary that all the rights and duties incident to the relationship of master and servant should exist between the employer and the person doing the injury, in order that the employer may be held liable. The existence or non-existence of this relationship is only one method of testing the question.

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The objection to allowing counsel to read to witness Babcock what Spears had sworn he said, was on the ground that counsel was reading from his own minutes and not from the Judge's, and that this mode of cross-examination was improper where the witness had not been called expressly for the purpose of contradicting. His Honor was right in refusing to allow the counsel for both defendants to cross-examine and address the jury. The pleadings shew that defendants relied upon the same defence. Where this is the case, the rule that only one counsel will be heard on the trial is clear: *Chitty's Arch. Prac.* 388 (12 ed.)

Under the bye-laws of the city of Saint John, made under the authority of 41 Vic., cap. 6, the contract became illegal and void, and the building which the defendant Walker had contracted for, a nuisance, and he would therefore be liable for an injury caused by it quite independent of any question of the liability of an employer for the acts of his contractor: *Brown v. Mayor of London*; ⁴ *Baily v. De Crespigny*; ⁵ *Geipel v. Smith*.⁶

October 19 and 20. *Weldon, Q. C.*, on the same side. Plaintiff was entitled to recover damages for loss of rent. If it had been attempted to have been shewn that the building would have rented for a certain sum then the evidence would have been objectionable, for the damages would have been uncertain and dependent upon the contingency of the plaintiff's being able to rent the building for that sum, but here the building had been rented and the loss of rent was a proper element of damage: *Bodely v. Reynolds*; ⁷ *Priestly v. McLean*.⁸ The

¹ 4 Allen (Mass.) 138.

² H. & C. 20.

³ 4 E. & B. 570.

⁴ 20 L. J., C. P. 225.

⁵ L. R. 4 Q. B. 180.

⁶ L. R. 7 Q. B. 404.

⁷ 8 Q. B. 779.

⁸ 2 F. & F. 288.

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allegation in the declaration that plaintiff was deprived of the use and occupation of the building is sufficient to found the claim for damages for loss of rent.

Assuming that the plaintiff's building was not built according to the city regulations, defendants would have had no right to remove it, and if they could not lawfully remove it, it is clear they would be liable for an unlawful act which caused it to fall: *Dimes v. Petley*;¹ *Arnold v. Holbrook*;² *Davies v. Mann*;³ *Lynch v. Nurdin*;⁴ *Steele v. Burkhardt*.⁵

The work on defendants' building had not been commenced when the bye-laws declaring it to be a nuisance passed. The fact that the contract was made two days before the passing of the bye-law, will not help the defendants. The express contract having been avoided by the bye-law, the only contract between the parties was a contract implied in law, and this contract must necessarily have been created after the passing of the bye-law. *Addison on Contracts*, page 246, (7 ed.)

The owner of real estate has a duty imposed upon him to use his land and see that others use it so as not to injure his neighbour. The authorities make a clear distinction between cases where the act causing the injury was contracted to be performed on the real estate of the employer and cases where the act has no relation to his real estate. The defendants had notice that the wall was not safe, and they were bound to see that it did not injure the neighbouring owners. There was a duty cast upon them and they are responsible for any injury arising from a neglect of this duty. The fact that a third party undertook to perform the duty, and it was his negligence that caused the injury, is no answer to the plaintiff's claim: *Hobbit v. London Railway Co.*;⁶ *Rich v. Basterfield*;⁷ *Crowhurst v. Amersham Burial Board*;⁸ *Mersey Docks Co. v. Gibbs*;⁹ *White v. Hindley Local Board of Health*;¹⁰ *Todd v. Flight*;¹¹ *Turley v. Ashton*;¹² per Blackburn, J., p. 319. *Forbes v. Lee, &c., Board*;¹³ *Fletcher v. Rylands*;¹⁴ *Bower v. Peate*;¹⁵ *Nichols v. Marsland*;¹⁶ *Humphries v. Cousins*.¹⁷

¹ 15 Q. B. 276.

² L. R. 8 Q. B. 100.

³ 10 M. & W. 548.

⁴ 1 Q. B. 29.

⁵ 104 Mass. 69, Albany L. J., Sept. 18, 1880.

⁶ 4 Exch. 254.

⁷ 4 Q. B. 802.

⁸ 4 Exch. Div. 5.

⁹ L. R. 1 H. L. 68.

¹⁰ L. R. 10 Q. B. 220.

¹¹ 19 C. B., N. S. 377.

¹² 1 Q. B. Div. 314.

¹³ 4 Ex. Div. 116.

¹⁴ L. R. 3 H. L. 330.

¹⁵ 1 Q. B. Div. 321.

¹⁶ 2 Exch. Div. 1.

¹⁷ 2 C. P. Div. 220.

The wall which fell and caused the injury had been accepted by Walker, and had been paid for on the certificate of his own architect. It was his duty to know whether it was unsafe or not, and if it was, to take proper precautions to prevent its falling and injuring the property of adjoining owners.

The counsel also referred to *Shipley v. Fifty Associates*;¹ *Ball v. Nye*;² *Gray v. Harris*.³

October 21 and 22. *Kaye, Q. C.*, in reply. There is no allegation in the pleadings under which the bye-laws made under 41 Vic. cap. 6. could be properly received in evidence, and the point that the defendants' building was a nuisance, is not open to the plaintiff. The Act authorizing the bye-laws is *ultra vires* as it creates a criminal offence. It is not shewn that the defendants' building was not commenced before the bye-laws were passed. It was the plaintiff's duty to shew this. The contract was made before the passing of the bye-laws and was, when made, perfectly legal. No statute will be construed to have a retrospective operation unless the statute provides expressly that it shall so operate. The contract was for a legal building, and it is not to be imagined that the Legislature intended by general words to destroy existing contracts and subject persons to indictments for acting upon them. The bye-laws can only apply to subsequent contracts. If the plaintiff's construction of the bye-laws is correct, any building not in accordance with them which was not complete when they passed (though contracted for before) would be a nuisance, and a person might have to take down the walls of a building which was substantially complete. There is no point between the making of the contract and the completion at which the line can be drawn.

The principal point is the liability of Walker, the employer, for the wrongful act of his contractor. The principle is now well established after a long course of conflicting decisions, that the employer is not liable for the negligence of the contractor. In order to render a person liable for the acts of another the relation of master and servant must exist. It is clear that this relation did not exist between Walker and the Messrs. Spears. No personal service was required of them. Walker had no

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¹100 Mass. 194, 198.²99 Mass. 582.³107 Mass. 492.

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control of the workmen, did not hire them, and had no power to dismiss them, and did not supply the material used. If the relation of master and servant existed, Walker could have dismissed the contractors and engaged others, or directed them to put the building in another part of the city, and the workmen employed by the contractors could have sued him for their wages. No such consequence would follow from this contract, and his Honor was therefore in error in telling the jury that the plaintiff was entitled to recover if the wall fell by reason of its defective construction. It is unnecessary to discuss the questions of interference by Walker and the acceptance of the work by him. His liability on these grounds would have to be determined by the jury and it was not left to them.

All the cases cited by the other side are distinguishable on the ground that there was a duty imposed upon or impliedly undertaken by the employer himself, or an obligation was imposed upon him by law, or the work ordered to be done was in itself wrongful. If either of these states of facts existed, Walker might be liable. There would be a duty cast upon him and he could not escape responsibility by employing some one else to perform it. The only duty cast upon Walker was to direct that a proper building should be built and employ competent persons to erect it. It does not appear that defendant ever had notice that the wall was not properly built; or was dangerous and required unusual precautions to make it safe, he cannot therefore be held liable on the principle established by that class of cases of which *Tarry v. Ashton* and *Bower v. Peate* are among the latest. In those cases it was held there was a duty cast upon the employer or owner to see that no injury resulted from the act which he directed to be done, because the act was of such a nature that damage must necessarily result from it unless special care was taken.

If the distinction contended for between the liability of owners of real estate and owners of chattels for the negligence of contractors ever existed it is now exploded: *Gayford v. Nicholls*.¹

Cur. adv. vult.

The following judgments were now delivered:

WELDON, J. The facts of this case are that plaintiff and

defendant Walker being owners of two lots of land adjoining on Prince William street, in the city of Saint John, a party wall was built between the two lots. The wall was hollow, with binders at proper distances, so as to make it satisfactory in regard to strength. The parties erected brick buildings on their respective lots soon after the great fire in Saint John in 1877. The Messrs. Spears were the contractors to do the mason work for the plaintiff's building, and also the contractors with Walker to do the mason work on his building. The rear, front and central walls were to be built new and entire—foundations of walls to bed on solid rock, to be levelled and stepped off as directed or required; all footings on hard and large flat stones, bedded in cement; where rock might not shew sound, or fit for footing, it was to be removed and concrete substituted. The contractor was required to use all proper care and diligence in bracing and securing all parts of the work against wind, storm and frost.

The proprietor, Walker, had engaged John C. Babcock as his superintendent of the erection and completion of said building: his duty being faithfully to enforce all the conditions of the contract, and to furnish all necessary drawings and information required to properly illustrate the design given; also to make estimates for the contractor of the amounts due him on the contract, in no case estimating any materials or work which were objectionable or had not become permanent parts of the work; and when the building was completed, to issue a certificate to the contractor, which certificate, if unconditional, should be an acceptance of the contract; and should release him from all further responsibility on account of the work.

There were other conditions in the contract empowering the proprietor, in case of the contractor being guilty of any delay or of his being unable to proceed with the work, after giving three days notice in writing, to enter on the work and proceed with the same to completion, charging the contractor with the cost of the same.

The proprietor also reserved the right to alter or modify the plans, make any deviation in the construction, detail or execution of the contract without in either case invalidating the contract.

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The contractor of the mason work to co-operate with the contractors for other work on the building, so that the same might not be delayed or hindered at any time; seventy-five per cent. of the value of the work performed to be paid the contractor by the proprietor when the same should be certified by the superintendent and the balance on the proper execution of the work by the first party. Twenty-five per cent. to be held by Walker as security, and as indemnity as far as the same was sufficient, to be applied to the liquidation of any damages arising under the contract.

The contractor proceeded with the work, and in building the centre wall, he built it so imperfectly on an insufficient foundation, not digging down to the rock or using concrete, that the wall gave way, carrying down the adjoining building belonging to the plaintiff. The insufficiency of the wall when carried up some distance was pointed out to the contractor, the superintendent architect, and to the defendant Sears, who was agent of the plaintiff, by the inspector of buildings for the city. But owing to the defective foundation on which the wall was built, it being on the clay instead of going to the rock, it was insufficient to bear the weight above it, gave way, and the effect of this centre wall being too weak to bear the superincumbent work and giving away, was to carry down the side wall of the plaintiff's building. This gave rise to this action, the plaintiff seeking to recover damages for the injury thus sustained.

The jury were directed by me that by the contract the employer retained control over the contractor, to see that the work was properly done according to the contract, and if it had been properly done, the injury and damage would not have occurred. It was not done in accordance therewith, and it was in a state from which danger was apprehended. The architect, and agent (Sears) had notice thereof from Maher the inspector of buildings. The wall was insufficient both in size and from not being on a solid base. From this defect the witnesses seem to agree the accident occurred. The wall in that imperfect state was accepted by the defendant Walker. His agent, Mr. Sears, had notice thereof from the inspector, Mr. Maher, and under such circumstances, if the jury should arrive at the con-

clusion that the wall in its fall carried down the side of the plaintiff's building, for such damage, I was of opinion, the defendants were liable. For the restoration and rebuilding of the wall by the plaintiff, the witness has detailed the items (\$4123.72). The claim for loss of rent, I was of opinion, was too remote. In that I might be wrong, but if the jury found for that they were directed to make it a separate finding, so that the court above could strike it out without interfering with their finding for restoring the building to that state it was in before the accident.

The cause was tried before me at the Saint John Circuit Court in November, 1879, and a verdict found for the plaintiff for damage to his building—\$3952.32, and for loss of rent and use of the same \$1375.

Objections have been made to the improper ruling at the time of trial.

1. The improper ruling of the Judge in not permitting each defendant's counsel to address the jury, and to cross-examine the witnesses.

2. Improper reception of evidence: Evidence of Spears the contractor having erected buildings in New York: Evidence of what rent the plaintiff was to receive: The evidence of what sums were paid to repair the building after it fell: The by-laws of the city regarding the erection of buildings: Showing the working plans to the witness, Causey.

Misdirection in telling the jury that the defendants were liable if the wall was improperly or defectively built so as to be unable to sustain the weight above, by reason of its not being on a proper foundation. That if Sears interfered as the agent of Walker and allowed the wall to remain in the defective state, as stated by the Inspector, and which was not contradicted by him, he also was liable. Telling them to find what damage was done to the building, and for the rent of the the building, separately. And for nondirection, in not telling them that the contractor only was liable; he being a competent person, defendant, Walker was not liable, the relation of master and servant not existing between the defendant, Walker, and Spears the contractor, or Babcock the architect. In not leaving to them the question whether the defendant Walker

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retained or exercised control over the building. Item for rent not recoverable as damages.

As to the first ground, the improper refusal to permit the counsel for each of the defendants to cross-examine the plaintiff's witnesses, and separately to address the jury for each defendant. The defendants have appeared by one attorney, and have not severed in their pleadings. The defendant, Sears, was acting as agent for Walker, and if Walker was liable, Sears who acted for him also was. They had no adverse interest. In *Nicholson v. Brooke*,¹ the defendants appeared by the same attorney, and the only question was whether all the defendants were parties to the contract. After the counsel for one had addressed the jury, a counsel for the other appeared to address the jury, but was refused. The plaintiff obtained a verdict; an application was made for a new trial on the ground that the learned Judge ought to have allowed counsel to address the jury for the other defendant.

Pollock, C. B., said :—

"There will be no rule. It is a matter purely for the discretion of the Judge at Nisi Prius. * * * If there are a number of defendants whose interests are precisely the same, and only one point of defence is raised, he exercises a proper discretion by allowing only one counsel to address the jury."

In *Chippendale v. Masson*,² Lord Chief Justice Gibbs said:—

"The interest of the defendants being the same, I can only hear one counsel. This is the rule I received from a Judge of whom no one can speak without respect, and almost reverence, I mean my very learned and excellent predecessor, Chief Justice Mansfield. By this rule I will abide."

In *Symm v. Fraser*,³ Cockburn, C. J., doubted if he could allow them to appear by separate counsel, unless their defence was distinct; and he would rely upon counsel's statement: the counsel stated neither of the defendants intended throwing the blame upon the other. Only one counsel was allowed to examine witnesses and address the jury.

The practice seems to be uniform. In this case where there was one defence, one plea, and one attorney, these authorities were cited on the trial, and I think I exercised a proper discretion.

The improper reception of evidence in allowing a witness to

¹ 12 Exch. 212.

² 4 Camp. 174.

³ 8 F. & F. 880.

speaking of buildings he had constructed in New York. The evidence to show what the building was to be rented for and the sum of money expended in repairing the building after the accident. The bye-laws of the city, directed by the Act of Assembly to be made. Allowing on cross-examination Causey, a witness to look at the plan, which was previously in evidence. The refusal to permit the defendants' counsel to read from his notes to defendants' witness what Spears had sworn was said by Babcock about making a mistake, in order to ask Babcock whether such statement was true or not. I having ruled it was irregular, as the witness could not be interrogated in this way: Spears had stated what took place, and the witness could give his version of the conversation. These objections were disposed of at the argument.

My refusal on the motion for a nonsuit, and erroneous ruling thereon, and my misdirection to the jury may be considered together, and may be stated to be that the defendant having reserved a right in his contract to control, modify and change the work, and having appointed his architect to see the work was done in accordance with the contract; and the architect, and the defendant Sears, Walker's agent, having the deficiency in the wall pointed out to them, and my telling the jury that if the accident occurred by the improperly built wall being upon an insufficient foundation, the defendants were liable and the plaintiff was entitled to recover.

The grounds of objection to my charge may be summed up as follows: In not telling the jury that where a person makes a contract to erect a lawful building on his own land with a competent person, he is not liable if that person builds it contrary to the contract and a neighboring owner is injured in consequence thereof. In not telling the jury that if the relation of master and servant did not exist, the employer would not be liable.

The case was very ably argued before me, when moving for a nonsuit, at Nisi Prius, and also on this motion. Numerous authorities were referred to; from them principles may be drawn, which may be useful in arriving at a correct conclusion.

I shall refer to several authorities cited in support of the objections to my ruling at the trial. *Hole v. The Sittingbourne*

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*and Sheerness Railway Co.*¹ was first referred to. The company had agreed with a contractor to construct a draw-bridge over a navigable river, and to complete the work as required by the Act of Parliament. The contractor failed to do so. The company was held liable. Pollock, C. B., in giving judgment thus lays down the principle at page 497 :—

“Where the Act complained of is purely collateral, and arises incidentally in the course of the performance of the work, the employer is not liable, because he never authorized the act ; the remedy is against the person who did it. That, however, generally affords but a poor compensation to the party injured ; for the wrong-doer is usually a common workman. Then comes the inquiry, who is the master ?—The contractor. In such cases the employer is not responsible. But when the contractor is employed to do a particular act, the doing of which produces mischief, another doctrine applies. * * * Where a man employs a contractor to build a house, who builds it so as to darken another person’s windows, the remedy is not against the builder, but the owner of the house. * * * In such cases it is the duty of the owner of the soil to inquire what is in the course of being done ; to know what is the plan ; to see that the materials are good, and to take care that no mischief ensues.”

Wilde, B., at page 500, uses the following language :—

“When we come to formulate the principle in *words*, there is some little difficulty. The distinction appears to me to be that, when work is being done under a contract, if an accident happens and an injury is caused by negligence in a matter entirely collateral to the contract, the liability turns on the question whether the relation of master and servant exists. But when the thing contracted to be done causes the mischief, and the injury can only be said to arise from the authority of the employer, because the thing contracted to be done is imperfectly performed, there the employer must be taken to have authorized the act, and is responsible for it.”

Butler v. Hunter,² decided by the same Judges as the preceding case of *Hole v. S. Railway Co.* There the plaintiff and defendant were owners of adjoining ancient houses, and an architect employed by the defendant to superintend the repairs of his house, having considered it necessary to pull down and rebuild the front wall, agreed with a contractor to do the work for an estimated price, and the workmen of the contractor in pulling down the wall removed a breast-sumner, which was inserted in the party-wall between the defendant’s and plaintiff’s houses, without taking any precautions by shoring or otherwise, in consequence of which the front wall of the plaintiff’s

¹ 6 H. & N. 488.

² 7 H. & N. 826.

house fell. Held that there was no evidence for the jury of any liability on the part of the defendant.

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In this case it must be observed the defendant merely employed the contractor to repair the house, and he never authorized or contemplated the taking out the brest-summer, the negligence of removing which caused the injury.

This would appear inconsistent with the judgment delivered by the same Judges in *Hole v. Sittingbourne and Sheerness Railway Co.*, but the case may be distinguished from other cases by a difference in the facts to which the principle is to be applied. In this case the extent of his order was simply to repair the house in a proper and workmanlike manner. Of the existence of the brest-summer, the negligent mode of the removal of which caused the injury, he may have been, and so far as appears, was wholly ignorant, as also of there being any necessity for its removal. He could, therefore, in no sense be said to have given any order for its removal. Its removal therefore was a matter wholly collateral to his order to make repairs and arose incidentally in the mode of the performance by the contractor of the simple order he had received, namely, to do all necessary repairs in a proper and workmanlike manner. In that case, therefore, in accordance with the principle in other cases, it was necessary to inquire whether the relation of master and servant existed, and it being held it did not, the defendant was held not to be liable.

*Pearson v. Cox.*¹ A servant of a sub-contractor knocked a tool out of the window and injured plaintiff. Held, the builder not liable.

*Bridges v. North London R. Co.*² Negligence of parties about the railway. Question for the jury.

*Gray v. Pullen.*³ The defendant Pullen was under the authority of a local Act authorized to make a drain from his house in a street into a sewer for general use. The female plaintiff fell into a hole made by the settling of the filling up in consequence of heavy rains, and was injured. Held, that, as the duty was imposed on the defendant by statute to do the work, he was not released from liability because he had employed a contractor to do it, and the contractor's neglect caused the breach.

*Pickard v. Smith.*⁴ A railway company had let refreshment

¹ 12 Q. P. Div. 399.

² L. R. 7 H. L. 213.

³ 5 B. & S. 970.

⁴ 10 C. B. N. S. 470.

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rooms and a coal cellar at a railway station to the defendant, the opening for putting coal into the cellar being on the arrival platform. A coal merchant had opened the trap door on the platform to put coal into the cellar, and left it open without any guard or protection. The plaintiff fell into this cellar opening. Held, the defendant was liable, although it was the coal merchant who had opened the trap, and left it open, because the very act which caused the injury was one which the defendant authorized the coal merchant to do, and because the coal merchant was entrusted by the defendant with the performance of a duty which it was incumbent on the defendant to do. Williams, J., was of opinion the railway company was also responsible, because the opening was on their platform, and they were bound to keep the approaches to their station safe.

In *Ellis v. The Sheffield Gas Co.*,¹ it is decided that although a person employing a contractor to do a lawful act, is not responsible for the negligence or misconduct of the contractor or his servants in executing the act, yet, if the act itself is wrongful, the employer is responsible for the wrong done by the contractor or his servants, and is liable for damage sustained by others. Lord Campbell, C. J., at page 769, said—

“I am clearly of opinion that, if the contractor does the thing which he is employed to do, the employer is responsible for that thing as if he did it himself.”

Knight v. Fox,² was an action for injury sustained by a scaffold erected to enable the parties the more conveniently to construct a bridge. A pole projected, and in consequence of the insufficiency of lights the plaintiff fell and broke his leg. The court held the defendant was not liable. The plaintiff's remedy was against Cockrane, who was acting as *sub-contractor* and placed the pole there and did the work there on his own individual account. The defendant took no part in the matter.

Cuthbertson v. Parsons,³ related to the improvement of a harbour. A steam tug was employed by the commissioners in towing. A vessel had sustained damage by the want of skill and negligence of the crew. An action was brought against the commissioners in the County Court where the plaintiff recovered, but judgment was reversed on appeal.

*Reelie v. The London and North-Western Railway Co.*⁴ The

¹ 12 E. & B. 767.

² 15 Exch. 721.

³ 12 C. B. 304.

⁴ 44 Exch. 244.

company contracted under seal with certain persons to make a portion of their line, and by their contract reserved to themselves the power of dismissing any of the contractor's workmen for incompetency. While the workmen were engaged in constructing a bridge over a public highway a heavy stone fell from a travelling truck and killed the plaintiff's husband.

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Rolfe, B., in pronouncing judgment, says at page 255 :

"It is not necessary to decide whether, in any case, the owner of real property such as land or houses, may be responsible for nuisances occasioned by the mode in which his property is used by others not standing in relation of servants to him or part of his family. It may be that in some cases he is so responsible. But then, his liability must be grounded on the principle that he has not taken due care to prevent the doing of acts which it was his duty to prevent, whether done by his servants or others. * * * Our attention was directed during the argument to the provisions of the contract, whereby the defendant had the power of insisting on the removal of careless or incompetent workmen, and so it was contended they must be responsible for their non-removal. But this power of removal does not seem to us to vary the case. The workman is still the servant of the contractor only, and the fact that the defendants might have insisted on his removal if they thought him careless or unskilful, did not make him their servant." Nonsuit entered.

Parke, B., explains that the term nuisances used by Rolfe, B., in the case of *Reedie v. The London and North-Western Railway Company*, means a nuisance as connected with a man's house, or with his fixed property, and not in the sense of a public nuisance.

Overton v. Freeman.^o The defendant had taken a contract to pave a district, and he had sub-let a part of it to Warren, who had employed laborers who had placed some stones in the street, and left them there under the direction of the district surveyor. The plaintiff fell over them and broke his leg. On the trial Chief Justice Jervis directed a nonsuit. A motion was made to the court to set aside the same and ask for a new trial. Maule, J., in refusing a rule, says, I think, therefore, that this case falling as it does within that class of cases in which the sub-contractor himself is criminally and civilly liable, there can be no liability on the defendants. I do not mean to say there can be no case in which both contractor and sub-contractor may be liable; but the mere fact of being

^o11 C. B. 867.

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contractor does not render a defendant liable without his personally giving directions, or even seeing what had been done, without interfering. Cresswell, J. In this case the defendant contracted to have the stones laid down as pavement, but do not appear to have directed or contracted to have the stones laid in the manner which caused the injury.

Peachy v. Rowland,¹ was decided on *Overton v. Freeman*.² This was a case of a public nuisance, and Maule, J., said, that a ratification of a public wrong will not do to make the defendants liable. If a man employ another to do a thing, and there are several ways of doing it, one involving a criminal act and another a civil act, he will be held not authorized to commit a public nuisance, when he could have done the duty without committing the public nuisance.

Steel v. South-Eastern Railway Company.³ When work is done for a company under a contract (parol or otherwise), the company is not responsible for injury resulting to a third person from the negligent manner of doing the work, though the company employ their own surveyor to superintend it, and to direct what shall be done. The work done, which was the cause of the injury, was the opening of a drain, which he particularly directed the contractor not to do, but to carry off the water in another way.

Sadler v. Henlock.⁴ The defendant employed a skilled laborer to clear out a drain for which he paid him 5/. The drain passed through a highway—it was not properly filled up, but the defendant did not interfere nor direct the manner of doing it. The plaintiff in passing along injured his horse by reason of the imperfect filling up of the drain. The defendant was held liable in an action against him. On the question of the relationship, Crompton, J., says: The real test is, whether the party has any control over the person doing the work, and it makes no difference whether the party is to be paid by the piece or day.

In *Serendat v. Sassie*.⁵ The appellant it was urged was not liable for the negligence of the contractors to clear land. The evidence shewed the appellants had contracted with certain

¹13 C. B. 182.
²11 C. B. 887.
³16 C. B. 550.

⁴4 E. & B. 570.
⁵L. R. 1 P. C. 152.

persons to clear a plot of ground from weeds and brushwood; the servants of the contractor, to clear the same, set them on fire, which extended to the respondent's land. The fire had extended to the land of the plaintiff below, for which the court awarded him \$5000. From the Supreme Court of Mauritius the defendant, now appellant, appealed. Sir E. V. Williams delivered the judgment of their Lordships, and said:—

"In order to exempt an employer from liability for the acts of those with whom he contracts, the latter must exercise an independent and *defined* calling in the performance of the duties, with which the employer must not personally interfere."

In *Pendlebury v. Greenhalgh*,¹ Lord Cairns said:—

"The defendant stated that he set the work out and determined the levels, but had nothing to do with the paving himself, except—a most material exception—superintending on behalf of the committee."

Mr. Justice Littledale, in his judgment in *Laugher v. Pointer*,² says:—

"Supposing the cases of *Bush v. Steinman* and *Sly v. Edgley* to be rightly decided, there is this material distinction, that there the injury was done upon or near and in respect of the property of the defendants, of which they were in possession at the time. And the rule of law may be that in all cases where a man is in possession of fixed property, he must take care that his property is so used and managed that other persons are not injured, and that, whether his property be managed by his own immediate servants or by contractors and their servants. The injuries done upon land or buildings are in the nature of nuisances, for which the occupier ought to be chargeable when occasioned by any acts of persons whom he brings upon his premises. The use of the premises is confined by law to himself, and he should take care not to bring persons there who do any mischief to others."

Abbott, C. J., in the same case, says at page 576:—

"Whatever is done for the working of my mine, or the repair of my house by persons mediately or immediately employed by me, may be considered as done by me. I have the control and management of all that belongs to my land or my house; and it is my fault if I do not exercise my authority so as to prevent injury to another."

In *Quarman v. Burnett*,³ Parke, B., in giving the judgment of the Court says:—

"It is true that there are cases (see instances,) in which the occupiers of land or buildings have been held responsible for acts of others than their servants done upon, or near, or in respect of their property; but these cases are well distinguished by my brother Littledale, in his very able judgment in *Laugher v. Pointer*. The rule of law may be that where a man is in possession of fixed property, he must take care

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¹ 45 L. J. Q. B. 2.² L. R. 9 Q. B. 487.³ 6 M. & W. 510.

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that his property is so used or managed that other persons are not injured; and that whether his property be managed by his own immediate servants or by contractors with them, or their servants. Such injuries are in the nature of nuisances; but the same principle which applies to the personal occupation of land or houses by a man or his family, does not apply to personal movable chattels, which in the ordinary conduct of the affairs of life are intrusted to the care and management of others, who are not the servants of the owners, but who exercise employments on their own account with respect to the care and management of goods for any persons who choose to intrust them with them."

The case of *Bower v. Peate*,¹ is the latest case on the question of the liability of employers in consequence of the negligent performance of work by a contractor. The defendant there contended: "That if I employ a contractor to do an act which is in itself lawful, and which may be done in a proper or improper way, and he does it in an improper way, then I am not liable."

But what says Lord Chief Justice Cockburn?—

"The contractor was not employed to give support to the plaintiff's house as part of the work he was to do for the defendant. It was not included in the specification, and formed no part of the work he contracted to do except so far as was necessary to satisfy his obligation to provide for the necessary support of the plaintiff's house—in addition to which the defendant stipulated that the contractor 'shall take upon himself the risk and responsibility of shoring and supporting the adjoining buildings, affected by the alterations, and shall make good any damage which may be sustained by the said buildings in consequence of the works, and shall satisfy any claim for compensation arising therefrom.' * * * The answer to the defendant's contention may, however, as it appears to us, be placed on a broader ground, namely, that a man who orders a work to be executed, from which in the natural course of things, injurious consequences to his neighbour must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing some one else, whether it be the contractor employed to do the work from which the danger arises, or some independent person, to do what is necessary to prevent the act he has ordered to be done from becoming wrongful."

The case of *Pickard v. Smith* is referred to by the Chief Justice with approbation, and the law as stated by Williams, J., in delivering the judgment of the Court, is cited and referred to with approbation. His Lordship also refers to the case of

¹ 11 Q. B. Div. 321.

Gray v. Pullen, as decided in the Exchequer Chamber—the Court below having decided the contractor alone was liable—this was however reversed by the Court of Exchequer:—

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“It is true that in that case the obligation to make good the road was one imposed by statute; but it can make no difference in point of principle, whether the obligation was imposed by statute or existed at law; and the case is therefore an authority for saying that, when a work is being executed from which danger may arise to others, and it thereby becomes incumbent upon the party doing or ordering it to be done, to take measures to prevent damage resulting to others; he cannot divest himself of liability by transferring the duty to a contractor.”

This case is referred to by the Lords Justices in the Court of Appeal, in *Angus v. Dalton*.¹ The case was this: Action by Angus against Dalton and the Commissioners of Her Majesty's Works and Public Buildings. The defendant, Dalton, was a buider and contractor, and the Commissioners of Public Works, had employed him to pull down a house, and erect upon the site thereof a new Probate Registry. The cause was tried before Lush, J., in 1876, at the Newcastle Assizes, when after the evidence had been given, two points were made on the part of the defendants. First, That Her Majesty's Commissioners of Works were not liable because they had employed a contractor to do the work, including the shoring up of the adjoining premises, and—Secondly, The contractor Dalton, was not liable because he had employed a sub-contractor to do the excavating work, which actually caused the mischief, and his contract was to do all that Dalton was bound to do. These points were argued, and the Court held upon the subordinate question of the liability of the commissioners for the contractors, that they were bound by the case of *Bower v. Peate*. The verdict was for the plaintiff. The case underwent discussion in the Court below, and it was held that both the commissioners and Dalton were responsible,—though they gave judgment for the defendants upon another ground. Brett, L. J., says:—

“As to the question raised by reason of the employment of an independent contractor, all the Judges were agreed that the case of *Bower v. Peate* was applicable and binding.”

Thesiger, L. J., says:—

“I am of opinion that the law there laid down by the Lord Chief

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Justice in delivering the considered judgment of the Court is correctly stated and placed on proper principles, and that the defendants in the present case who have ordered work to be executed, from which in the natural course of things injurious consequences to the plaintiff's factory might arise, unless means to prevent them were adopted, and if the plaintiffs are entitled to recover at all, are responsible for the damage which has arisen, owing to the means adopted having proved to be insufficient."

Cotton, L. J., p. 239 says:—

"On this point I agree with the decision in *Bower v. Peate* that where a defendant had employed a contractor to do work which in its nature is dangerous to the neighbouring property, and damage is the result of work done, the employer is liable though he has employed a competent contractor, and given him directions to take precautions in excavating the work."

From a careful review of the cases, the principle deducible therefrom, as laid down by Lord Campbell in *Hole v. The Sittingbourne Railway Co.*, "where the injury arises from the imperfectly doing the thing ordered to be done," is that the employer cannot escape from the consequences which have arisen therefrom. The employer, while lawfully making improvements on his own property and premises, must take care that the work so done, shall not cause damage to his neighbor.

The building of the wall in the centre of the defendant's building of insufficient strength to sustain the superincumbent weight thereon, would necessarily produce in the natural course of things injurious consequences to his neighbor. This must be expected to arise, unless means be adopted which would prevent such consequences, by placing the same on a solid foundation, and the employer is bound to see that such is done. He cannot escape from this responsibility by having it done by some other person. Where the agent, Mr. Sears, and the architect of the building for Mr. Walker, could enforce all the conditions of the contract; had notice of the insufficient state of the wall and that it was too weak to sustain the pressure which it was intended to bear, and the defendant Walker knew there was a talk about the wall, I think the case is within the rule of law as stated by Lord Chief Justice Abbott, in *Laugher v. Pointer*, and repeated by Parke, B., in *Quarman v. Burnett*, that when a man is in possession of fixed property he must take care that his property is so used and managed

that other persons are not injured, and that, whether his property is managed by his own immediate servants or contractors and their servants. Lord Chief Justice Cockburn lays down the same doctrine, and it is approved of in the appellate division as to the necessity of the employer providing for preventive measures being taken, not merely stipulating that it be done but taking care it is done.

It was not an act collateral to the work which the employer ordered or contracted to be done, but the very work itself done imperfectly in the sinking of the foundation for the wall, and the size thereof. It was wrongful therefore to allow that to be done on his own soil which, when done, operated as a nuisance and caused an injury to the plaintiff's building, which is what is complained of. It violated the maxim—use your own rights and property so as not to hurt another. The defect of this wall was pointed out to the defendant through his agent Sears, and to the architect by the inspector of buildings. The employer had reserved the right to remove all improper work, materials and workmanship of the contractor, and to alter or modify the plans and specifications, and had engaged the architect, Babcock, for that purpose; and although there might be some independence in the contractor in this case, yet it is quite manifest that the employer did not abandon the whole control and supervision of the work, and upon that admission alone, the liability of the defendant, Walker, exists. The contract shews and the evidence also shews that the architect Babcock, and the agent Sears, were especially appointed to be and were upon the work during its whole progress and their attention was called to the very work which was the cause of the injury; and this very work was certified by the architect and paid for by Mr. Sears for the defendant Walker, thereby adopting the same. It is difficult to say, on the face of all these facts, that the defendant Walker and his agent Sears are not answerable for the damage to the plaintiff for the work so improperly and negligently done. Mr. Sears then assumed the charge for his principal and paid for the same on the architect's certificate, and all this after the inspector had called their attention to the wall. The directions given by Mr. Sears to the architect were not carried out by him.

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The plaintiff's counsel, Mr. Barker, contended the plaintiff was entitled to retain his verdict for the damage to the plaintiff's building on the ground that the wall was not built in accordance with, but in violation of the bye-law of the city of Saint John, under the Act of the Legislature 41 Vic. cap. 6, The Saint John Building Act, 1877.

The bye-law was passed 26th September, 1877, two days after the contract by Spears and Walker was entered into. The contract bears date 24th September, 1877, and being an illegal wall, the defendants were liable. It was contended by Mr. Kaye, for the defendant, that the contract having been entered into before the bye-law was passed, it would not affect the contract, and it was not within any law in force at the making of the contract and it could not have a retrospective operation. The wall was not commenced until some days after the passing of the bye-law. I expressed no opinion on this point at the trial, but I find an authority that the contract if it conflicted with the bye-law would be void. The authority for this is *Waugh v. Morris*.¹ Blackburn, J., in delivering the judgment of the court, says:

"We quite agree that when a contract is to do a thing which cannot be performed without a violation of the law it is void, whether the parties know the law or not."

The wall was not built in accordance with the bye-law. I should rather gather from the evidence that the parties were aware of it, for Mr. Walker says in his evidence he told his architect there was a new law, and there was a talk about the wall, and his architect said it would be all right. I think the opinion I formed at the trial, and still retain, that defendants would be liable under this state of facts is correct.

At the close of the argument in this case Mr. Thomson contended that the issue of the possession ought to have been submitted by me to the jury. It may be a sufficient answer to this question to state that it was not raised at the trial, nor discussed there, and I offered to leave any question to the jury which the counsel might desire, but none were proposed, and it is too late now for such an objection. See *Martin v. The Great Northern Railway Co.*² The defendants rested their

¹L. R. 8 Q. B. 202.

²16 C. B. 179.

case on the highest ground that the employer was not liable. But what was there in the evidence to shew the possession was in the contractor Spears. They had a contract with Walker to do the mason work on a block of stores. Miller and Nice were contractors with Walker to do the carpenter work, and the contractor for the mason work was to co-operate with the contractors for the other parts, so that neither should be delayed or hindered in their work. Neither the defendants, Walker, nor Sears, speak of being out of possession. Walker says Babcock was my architect and Mr. Sears looked after it—I trusted to them. The authority for their position, cited by the defendants' counsel, was *Dyson v. Collick*.¹ In that case the plaintiff had entered into a contract with a company for *forming a canal*, and in the course of performing their contract had erected a dam upon the *locus in quo* by permission of the owner of the soil. It was made in January, 1821. Between that time and December it had been repaired by the plaintiffs. The defendants had entered and cut the dam. A verdict was found for the plaintiff. The defendants contended that they had no such interest as to maintain trespass and moved for a new trial. The court said,—

“The dam was erected by the plaintiffs at their own expense, and with their own materials, upon the *locus in quo* with the consent of the owner of the soil, for a special purpose. Until that purpose was completed, the plaintiffs were entitled to the possession of the dam. Now, it is perfectly clear that the person in possession of property, whether rightfully or wrongfully, may maintain trespass against a mere wrong doer. Indeed, if they had any other than a partial or subordinate interest in the dam, trespass is the only proper remedy.”

This case does not, in my opinion, assist the defendants.

Lord Campbell, C. J., in *Munro v. Butt*,² an action brought by a contractor for building a house on defendant's land which he had failed to complete and had not obtained the required certificate. The defendant had assumed possession of the unfinished building, and was enjoying the fruits of the plaintiff's labor. He says—

“Now, admitting that in the case of an independent chattel, a piece of furniture for instance, to be made under a special contract, and some term which amounted to a condition precedent, being unperformed, if the party for whom it was to be made had yet accepted it,

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an action might, upon obvious grounds, be maintained, either on the special contract with a dispensation of the conditions alleged, or an implied contract to pay for it according to its value; there do not seem to us that there are any grounds from which the same conclusion can possibly follow in respect to a building to be erected, or repairs done, or alterations made to a building on a man's own land, from the mere fact of his taking possession. Indeed, the term "taking possession," is scarcely a correct one. The owner of the land is never out of possession while the work is being done. But, using the term in a popular sense, what is he, under the supposed circumstances, to do? The contractor leaves an unfinished or ill-constructed building on his land."

This authority appears conclusive on the point of possession. The onus was on the defendants to prove their pleas. The contract does not prove it, nor was there any evidence of the defendants being out of possession to leave to the jury.

As to the damages, the jury found the wall was improperly built and fell from its weakness and inability to sustain the weight upon it, and assessed the damages for repairing the plaintiff's building at \$3952.32. The damages found for the rent which was to be received when the building was finished is, I am of opinion, too remote. The plaintiff can only recover for what it will cost to place his building in the same state it was before the accident. The case of *McMahon v. Field*, Law Journal Weekly Notes, 12th March, 1881, on remoteness of damages, is applicable to this case.

WETMORE, J. The defendant Walker, on the 24th of Sept., 1877, entered into a contract, not under seal, with J. & W. C. Spears, by which they agreed to furnish all the material, labor, tools, machinery, &c., and to build, finish, and complete for Walker, all the mason and other work of the block of stores to be erected on Prince William street east side, between Princess and King streets, to be as described in specifications and according to the plans and drawings therein especially referred to, which plans and drawings were declared to be a part of the agreement. The party of the second part, Walker, in consideration of the party of the first part fully and faithfully executing the aforesaid work, and furnishing all the materials therefor as specified, so as fully to carry out the design according to its true spirit, meaning and intent, and in the manner and by and at the time set forth in the specifications, and to the full and complete satisfaction of John C. Babcock superintendent, agreed

to pay to the first party as the work progressed and as the same should be certified to by the superintendent, the sum of \$10,441 to be paid on demand as the work progressed, amounting to seventy-five per cent. of the amount as set forth and specified and as the same should be certified by the superintendent, and the balance, twenty-five per cent., as should be found due as thereafter provided. It was arranged that twenty-five per cent. agreed to be reserved from the value of the work executed, should be held by Walker until the full completion of the work to the satisfaction of the superintendent aforesaid, as security for the proper execution of the contract by the first party, and as indemnity, as far as the same was sufficient, to be applied in the liquidation of any damages arising under the contract. The specifications, mason's, among other matters, are very thorough. All foundation walls were to be extended *to bed of solid rock*, to be levelled and stepped off as directed or required. Under the head of mason's specifications were a number of specific provisions, eleven in all. The fifth and eighth provisions governed the learned Judge in his decision on the trial.

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The fifth is:—

“The proprietor has engaged John C. Babcock as superintendent of the erection and completion of the said building: his duty being faithfully to enforce all the conditions of the contract, and to furnish all necessary drawings and information required to properly illustrate the design given; also to make estimates for the contractor of the amounts due him on the contract, in no case estimating any materials or work which are objectionable or have not become permanent parts of the work, and when the building is completed to issue a certificate to the contractor, which certificate *if unconditional shall be an acceptance of the contract*, and shall release him from all further responsibility on account of the work.

The eighth is:—

“The proprietor reserves the right by conferring with the superintending architect to alter or modify the plans, and this specification in particular, and the architect shall be at liberty to make any deviation in the construction, detail or execution, without in either case invalidating or rendering void the contract. And in case any such alteration or deviation shall increase or diminish the cost of doing the work, the amount to be allowed to the contractor or proprietor shall be such as may be equitable and just.”

By the sixth provision it was to be understood by the contractors that the building was entirely at their risk until the same was accepted, and they would be held liable for its safety to

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the amount of money paid by the proprietor on account of the same.

We have been favored with a short-hand writer's report of the learned Judge's decision on the motion for a nonsuit, and also of his charge which is certainly a very great convenience, and for which I think the Court are under much obligation. Not having heard any objection to the correctness of these reports I shall be governed by them.

From the evidence it appears certificates, under which payments were made the contractors, were granted by the superintendent. These certificates do not seem to have influenced the learned Judge; in his conclusions he appears to have been governed entirely by the 5th and 8th provisions above mentioned, and from them to have formed his judgment. There is no time specified in the contract before me when the work was to be completed. By the 7th provision mention is made of unnecessary delay, &c., by the contractor in providing the necessary materials, and performing the necessary labor, and to insure the completion and delivery of the building or work at the time *set forth and contracted for*, and in case of delay, &c., the proprietor, within three days after having notified the contractor in writing of his intention so to do, was entitled to enter on the work, &c., &c. And it was only under this 7th provision the proprietor could enter on the premises. There are blanks on the back of the agreement attached to the specifications, which could readily have been used for the purpose of setting forth the time for completion of the contract, but they are not filled in or signed, so no time is specified for completion of the contract.

By provision No. 2, the contractor was to follow the plans referred to and to furnish all materials and execute all work in strict accordance therewith, and with the quality and kind of material set forth in the specifications and shown by the drawings. By provision No. 3 the building was to be a perfect and finished job of the kind. I do not discover that the 8th provision materially affects the matter in contest in the present case; it refers rather to alterations and deviations.

By the 5th provision the architect *was faithfully to enforce all the conditions of the contract; to furnish drawings, &c.*;

to make estimates,—*in no case estimating any materials or work which were objectionable*, or had not become permanent parts of the work; *and when the building was completed* to issue a certificate which, if unconditional, should be an acceptance of the contract, and should release the contractor from all further responsibility on account of the work. When the alleged damage was done the building was not completed, so the latter part would not have come into operation. There not being a specific time for the completion of the work the contractor had a reasonable time for completing it. As before mentioned by 7th provision, in case of any unusual or unnecessary delay or inability of the contractor to provide and deliver the necessary materials and *perform the necessary labor* at the time the same was required, so as to insure the completion and delivery of the building or work at the time set forth and contracted for, the proprietor after three days notice in writing, had *a right* to enter upon the work and procure such necessary materials or labor to be furnished or performed as the case might require, and remove from the same all defective materials or workmanship as in the judgment of the superintendent might be found necessary, and carry on the work to completion in such way as should be proper and right, charging the cost thereof to the contractor and deducting such charges from the amount of the contract price. Supposing it can be successfully argued, that the words *failing to perform the necessary labor*, would give the proprietor a right to give the notice under provision 7, and assume the completion of the work at the contractor's expense—in case the centre or other walls were not put upon solid rock, which the contract required, this defect however, the architect as superintendent, did not discover, until after the accident. It was a provision for the protection and benefit of the proprietor, of which he might or might not avail himself at his option. At all events he did not take the benefit of it, and his omitting to do so, I do not think will increase his liability in the present suit, as until actual possession was taken by the proprietor, the possession was in the contractor. The proprietor could only take possession for some failure on the contractor's part, under the 7th provision, and could take possession or not at his option. No doubt the superintendent had a very large controlling power.

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v. In no case was he to estimate any materials or work which were
WALKER. objectionable. Assuming the certificates given by the superintendent can be considered as an appropriation of the work certified for, such an exercising of control over it as would render the contractor liable for any damage its defective construction might cause, the giving the certificate would require to be with an intention to assume the control, and with knowledge of the state of the works—or it would not be binding on the proprietor—as in case of defective foundation of the wall. As to its not going down to solid rock, whatever effect, *if any*, the certificate might have on the question of exercising control over the wall if the superintendent knew of the defect, if he did not know of the defect, it ought not, and I think should not affect the proprietor, whatever charge of carelessness the superintendent might subject himself to by reason of his not watching the laying of the foundation more narrowly. At all events the question of appropriating the wall covered by the certificate would be matter for the jury to decide under full consideration of all the circumstances proved on the trial, and this matter has not been pronounced upon by the jury. The liability of the proprietor I think does not arise from the terms of the contract. The learned Judge in refusing the nonsuit says: the attention of the superintendent was called to the wall by the inspector of buildings twice. The superintendent does swear he did not know the wall was not on solid rock until after the accident. If the calling attention to the wall would affect the case, the evidence not agreeing rendered the matter eminently a question for the jury.

In his charge, the learned Judge directed the jury that the contract shewed that the defendant Walker, retained control over the work. He had his own architect and directed him to see that the work was satisfactorily done. This was exercising control over the work. In this power and control he reserved the right to modify and change the work, and it was his duty to see the work was carried on according to contract. The wall, had it been made according to specifications, the witnesses state, would have been a perfect wall; but it was not. It was not

down to the solid rock; part of it was made or put on soft bottom-clay and not with concrete, and when the pressure came on it, it slid down. It thus appears the defendant Walker contracted for a perfect wall—such a wall as he had a right to contract for, and if the contract had been carried out no damage would have happened. I apprehend it was the contractor's business to see the wall was built up to the contract. The contractor no doubt would be liable for defects in the carrying out of his contract. No question of the defendants' interference as creating a liability was left to the jury. The position of defendants' liability by the terms of the contract was broadly assumed, and the jury were told, if the wall fell from defects in its construction the defendants were liable because of the power reserved in the contract that could be exercised by the superintendent. No act done or anything said by the defendants', or either of them, was left to the jury. The simple proposition enunciated was that they were liable by virtue of the defendant Walker's superintendent having a power to interfere. This direction I think cannot be sustained.

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In *Steel v. South-Easterh Railway Co.*,¹ it was held, that where work is done for a company under a contract, parol or otherwise, the company is not responsible for injury resulting to a third person from the negligent manner of doing the work, though the company employ their own surveyor to superintend it and to direct what should be done.

That a party can make a contract for the erection of a building, *legitimate* in itself, being careful to employ a competent contractor to erect and complete it, without creating any liability by reason of the contractor failing to adhere to the terms of the contract, is too well established to need the citing of authority. I may mention *Ellis v. Sheffield Gas Consumers' Company*.²

In *Butler v. Hunter*,³ it was held, that where a person employs another to do a lawful act it must be presumed, in the absence of evidence to the contrary, that he employs him to do it in a careful and proper manner, and unless the relation of master and servant exists between them the employer is not responsible for the negligent manner in which the act is done.

¹ 16 C. B. 550.² 2 E. & B. 767.³ 7 H. & N. 826.

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Therefore where the plaintiff and defendant were owners of adjoining ancient houses, and an architect employed by the defendant to superintend the repairs of his house having considered it necessary to pull down and rebuild the front wall, agreed with a contractor to do the work for an estimated price, and the workmen of the contractor in pulling down the wall removed a breast-summer which was inserted in the party wall between the defendant's and plaintiff's house without any precautions by shoring or otherwise, in consequence of which the front wall of the plaintiff's house fell, held, that there was no evidence for the jury of any liability on the part of the defendant.

At page 828, Martin, B., says, where a person employs a builder to do certain work and he does it negligently, the employer is not liable *unless he personally interferes*. The relation of master and servant must exist before any person can be made liable, other than the person who did the act which caused the mischief. At page 830, he adds that there was no evidence that the defendant ordered the work to be done otherwise than carefully and properly.

Per Wilde, B.: In the case of almost every house that is built, the owner employs an architect, the architect employs a builder, and the builder employs workmen, but the owner of the house is not responsible for the negligence of the workmen.

Per Pollock, C. B., page 832: But where the mischief arises not from the act itself but from the improper mode in which it is done, the person who ordered it is not responsible unless the relation of master and servant exists.

Wilde, B., at page 832, distinguishes *Hole v. The Sittingbourne and Sheerness Railway Company*.² There it is said, that where the act itself has caused the injury, the person who ordered it is responsible, but where the injury happened from something collateral, in the course of carrying out the order, he is not responsible.

No doubt a proprietor with an existing contract that protected him from liability might so interfere with the work as to render himself personally responsible, but in such case, his responsibility would be by reason of such interference, not

by virtue of the contract. All the surrounding circumstances would require to be considered, and unless the evidence was unquestionably all one way (which it is not in the present case), the jury would have to pronounce the conclusion. This has not been done in the case before us. The learned Judge has decided the matter adversely to the defendants upon the contract itself, which, I think, it was not competent for him to do.

I purposely abstain from saying more at present, as this motion is only for a new trial. If it was a motion for a nonsuit, the question of plaintiff's right to recover at all would have to be determined. What may turn up on a new trial, if a second trial should be had, or what the result of a verdict under a different direction might be, it is needless to discuss. I am only required to pronounce my opinion upon the case as it was presented to the jury, and as so presented, I, with all deference to the opinion of my learned brother Weldon, am unable to come to the conclusion that the verdict can be sustained.

Then as to the sand contributing to the damage. Several pleas raise this question. Mr. Sears, a witness for plaintiff, attributes the injury to the fact of some boards being fastened close up to the centre wall instead of a space being left between the boards and the wall, that the rain might escape without running down the wall. He says he knew there was a very heavy rain storm of some nineteen or twenty hours duration, which had been the cause of the water running down the wall that caused the injury. He also says the foundation was to the rock.

The foundation of plaintiff's building was not carried to the rock. James Thomson says a large quantity of sand was improper; McMurray speaks of the sand; O'Brien speaks of one hundred loads of sand lying against the centre wall; McMonagle thought it was dangerous to have so much sand there—it might affect the wall; he speaks of from seventy-five to one hundred tons. If no sand had been there, in his opinion the rain would not have carried down the wall. He found the wall under the sand side was gone and was perfectly sound on the other side. Babcock believed the injury was caused by the sand. Without further stating any particular evidence, I think there was sufficient evidence of the sand causing the damage to raise

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McMILLAN not left to them. The injury being caused by the sand was
v. important under the fourth plea to first count, fifth plea to the
WALKER. second count, fourth plea to third count, fourth plea to fourth
count, third plea to fifth count, fourth plea to fifth count.

As to the liability of Sears, I think this should have been specifically left to the jury with a direction from the Judge as to what would create a liability on his part. Some of the witnesses speak of his interfering. Some say he gave orders; others say he gave no orders. It is said he was the agent. He says himself, after the contract was made he did not interfere directly or indirectly. It did not appear he was to derive any benefit from it. Without expressing any opinion as to whether or no there was sufficient evidence to have justified the jury in implicating Sears, I think this verdict cannot be saddled upon him without the jury, with proper directions, having found against him. On this ground also I think the verdict cannot be sustained.

As to the corporation ordinance, it was not made until two days after the contract, so the contract would be legitimate when entered into. Whatever effect the ordinance might have if properly before the court, I think it should have been pleaded. At all events, if the plaintiff's wall was not built in accordance with the law, which appeared to have been assumed on the argument, the injury not appearing to have been wilful or intentional, I do not very well see how the ordinance would aid the plaintiff. These matters, I think, should have been pronounced upon by the jury, and they were not.

The fact of the learned Judge offering to put any questions the counsel wished to the jury, I do not think should affect the case. All the issues had to be properly disposed of whether the counsel wished questions put to the jury or not. To dispose of all issues was the Judge's peculiar duty. The issues were put on the record for that purpose, and whether the counsel wished any questions put to the jury or not, they should have been disposed of.

The counsel not availing himself of the learned Judge's offer will not, I think, prevent his taking exception to any of the issues being overlooked or left unpronounced upon or mis-

directed upon. Certain issues are presented for trial, and if they are material, and are left undisposed of, or not properly disposed of, I do not see how a verdict leaving them undisposed of, or improperly disposed of, can be sustained.

As to the alleged improper refusal of the learned Judge to permit the defendant's counsel to read to witness Babcock what Spears had sworn was said by him, Babcock, about making a mistake, in order to ask Babcock whether such statement was true or not, the learned Judge ruling that Babcock could only be asked to give his version of the conversation.

Leading questions, that is, questions which suggest to the witness the answer desired, or which, embodying a material fact, admit of a conclusive answer by a simple negative or affirmative, are not in general allowed to be put: Taylor Evid., 4 ed., page 1191, sec. 1162 (a). To abridge the proceedings and bring the witness, as soon as possible, to the material point on which he is to speak, the counsel may lead him on to that length and may recapitulate to him the acknowledged facts of the case which have been already established (same sec.)

Section 1263, page 1192. So where a witness is called to contradict another who has denied using certain expressions, counsel are sometimes permitted to ask whether the particular words denied, were not in fact uttered by the former witness, citing *Edmonds v. Walter*,¹ per Abbot, C. J.; but this rule seems only to apply to such expressions as in *themselves are not evidence* in the cause. The object of relaxing the general rule being simply to exclude the other parts of the conversation which would not be admissible: *Hallett v. Cousens*,² per Erskine, J.

As to the Judge's discretionary power which he has, uncontrollable, even on a bill of exceptions, and exercisable to whatever extent he may think fit, (though the power should only be exercised so far as the purposes of justice plainly require) see Taylor, Evid. s. 1263. This is a power to extend the putting of leading questions, not to restrict where the party has a right to put them.

Where a witness is called in order to contradict the testimony of a former witness who has stated that such and such

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¹ 8 Stark. 7.

² 2 M. & R. 228.

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expressions were used, or such and such things were said, it is the usual practice to ask whether those particular expressions were used, or those things were said, without putting the question in a general form by inquiring what was said. If this were not to be allowed, it is obvious that much irrelevant and and even inadmissible matter would frequently be detailed by the witness. The negative, if not allowed to be directly proved, could only be proved indirectly by calling on the witness to detail the whole of what was said on the particular occasion, if any such were singled out by the evidence, or to detail the whole of several conversations, where the use of the alleged expressions was not limited to any conversation in particular. After all, the evidence would not be complete and satisfactory to establish the negative, unless sooner or later, the question as to the use of the particular expressions were to be directly put, for till then, the evidence would shew only that the witness did not remember their use; but the direct negative, after the attention of the witness has been excited by the suggestion of the very expressions, would go much farther. Starkie's Evid., 7 Am. ed., pages 171 and 172.

In *Hallett v. Cousens*,¹ the counsel examining a person to contradict a witness, was not at liberty to lead by reading from his brief the words denied, the conversation spoken to by the first witness *being evidence of itself*. What the witness said about making a mistake would not amount to evidence of any fact in the case. I am therefore of opinion the counsel had a right to lead the witness by reading the statement made by the previous witness. The attention of the witness must be called in some way to the particular statement, and without the statement being read or made known to him, I do not very well see how he could say whether or no he made it to the previous witness.

As to refusing to allow the counsel for each party to cross-examine separately, I refer to *Symm v. Fraser*.²

Cockburn, C. J., expressed a doubt as the defendants pleaded jointly, whether they could appear by counsel separately, but his impression was that if the defences were in substance different he should allow the defendants to be represented

¹ 12 M. & R. 226.

² 13 F. & F. 850.

separately. Next day the learned Judge said, as the defendants joined in their pleading they could not appear by separate counsel, unless their defences in any material sense were different and distinct, as to which he should rely on the statement of counsel. Parry, Sergt., said he was bound to say that neither of the defendants meant to throw blame upon the other, or to set up a defence in substance different. Cockburn, C. J., said, upon this answer he thought that the defendants had not a right to appear by different counsel.

In *Seale v. Evans*.¹ Where the defendants had pleaded a joint plea of not guilty. The Judge would not allow counsel for each defendant to cross-examine separately or to address the jury separately. *Vide* note to the case. In the case of *Ridgway v. Philip*.² Where two defendants pleaded separately and by different attorneys and employed different counsel at the trial, it was held that the counsel for each defendant had a right to cross examine the witnesses, and to address the jury separately, and on Mr. Kelly, for the plaintiff, observing that this practice had been held to be incorrect, Mr. Baron Parke said, "it has been so ruled, but it is not calculated to further the ends of justice. I think the proper course was pursued in the present case." (In this case the counsel of the two defendants cross-examined and addressed the jury separately.) In the case of *Chippendale v. Masson*,³ where several defendants appeared by separate attorneys and had separate counsel, Lord Ellenborough only heard one counsel address the jury, and only allowed one cross-examination, because the defendants were all in the same interest.

In *Perring v. Tucker*,⁴ where two defendants appeared and pleaded by one attorney, but at the trial counsel appeared only for one defendant, and the other defendant appeared in person, the counsel only was allowed to address the jury, but the defendant who had no counsel, was allowed to cross-examine the witnesses. I cannot see why the parties appearing and pleading the same pleas by same attorney should make any difference if separate counsel appear on the trial. Such a course tends most materially to save expense, and to reduce the volume of pleading. Different grounds of defence may be available under one plea.

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¹ 7 C. & P. 508.² 1 C. M. & R. 415.³ 4 Camp. 174.⁴ 4 B. & P. 70.

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I think the weight of authority is in favor of allowing each counsel, at all events, to cross-examine the witnesses in the absence of the Judge calling on counsel to ascertain whether the defences are identical or substantially separate, as was done in *Symm v. Fraser*.¹ When the evidence was concluded the Judge could decide for himself whether or no there was reasonable ground for both counsel to address the jury without calling on counsel for information as to the grounds of defence being substantially different. The defendant, Walker, has been defeated substantially upon a construction of the contract. The other, who it appears was merely an agent, not a party to the contract in any way has been associated with him in his defeat; and to a sufficient extent to test the principle has not been allowed by his counsel to cross-examine witnesses against him. The defendant, Walker's counsel, no doubt for the purpose of testing the point on his behalf has also been denied the same privilege. What benefit either party might have derived from the exercise of the privilege, it is impossible to say, and it is equally impossible to say what prejudice or loss has been caused to either or both defendants from having been denied the privilege of cross-examination. The grounds upon which each defendant sought to escape liability are, I think, substantially different. One defendant, Walker, was found guilty upon the learned Judge's construction of the contract. The other defendant, Sears, could only have been defeated by reason of some interference with the work. On this ground also, I think the verdict should not be allowed to stand.

The rule for a new trial I think, should be made absolute.

The Court being equally divided, the verdict stood for \$3952.32, the amount of damages found by the jury.

Rule accordingly.

IN RE THE GOODS OF ALEXANDER FERGUSON.

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[1st Division, before ALLEN, C. J., and DUFF and PALMER, JJ.]

April.

Will—Execution—Signature by testator—Presumptions where no positive evidence of signature being to will when attested by witnesses—What a sufficient acknowledgment in the presence of witnesses—Evidence—How far attestation clause may be—Witnesses signing in each others' presence.

If a testator produces a paper and asks persons to sign it, giving them to understand that it is his will, it is not necessary to have direct evidence that his signature was on the paper when he asked them to sign it; but the court is at liberty to judge from all the circumstances of the case whether his signature was there at the time or not.

To a will written in the testator's handwriting and concluding with the following *testimonium* clause: "In witness whereof I have hereunto set my hand and seal," etc., was an attestation clause, also, in the testator's handwriting as follows: "The said Alexander Ferguson" (the testator) "this, etc., sealed and delivered this instrument as and for his last will and testament, and we, at his request and in his presence and in the presence of each other have hereunto written our names as subscribing witnesses." (Signed) "Charles McKeen, William McKeen." When produced, the will bore the testator's signature in the usual place. It was not signed in the presence of the witnesses, and there was no evidence that either of them saw his signature to the paper when they subscribed it as witnesses. The testator brought the will to the witnesses' shop, and told C. McK., one of them, it was his will, and asked him to sign it. The other, W. McK., a brother of the first coming in at the time, the testator said, "let your brother sign also," which the latter did without knowing what the paper was. He did not remember seeing his brother sign it. He did not know what the paper was and no one told him.

Held, (by ALLEN, C. J., and PALMER, J., DUFF, J., *dubitante*), that it might be presumed that the testator signed it before he went to the shop and that it was then a complete instrument so far as he himself could complete it.

Held (by ALLEN, C. J., and DUFF, J., PALMER, J., *dissenting*) that there was not an acknowledgment by the testator of the will in the presence of the witnesses as required by the Act. (Consol. Stat., c. 77, s. 5.)

By DUFF, J., that there was not a proper attestation by the witnesses in the presence of each other.

By PALMER, J., that looking at the attestation clause there was sufficient evidence of the witnesses having signed the will in the presence of the testator and in the presence of each other to justify the court in upholding the will.

The court on an appeal from the Probate Court will decide questions of fact from the evidence sent up on appeal irrespective of the finding of the Judge of the Probate Court. (Consol. Stat., c. 52, s. 47.)

Appeal from the decision of the Judge of Probates for Northumberland County. The question in the case was whether a paper propounded by the appellant as the will of Alexander Ferguson had been duly executed as such. The Judge of Probates decided that it was not duly executed.

Charles McKeen, the first witness, who was well acquainted with the deceased, and had had considerable dealings with him,

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gave the following account of what took place when he signed the will :—

"I remember putting my name to a paper, (the will was then put in his hands). I cannot say I know this paper. I must have seen it, for this is my signature (points to his name). I must have signed it. I don't remember putting my name to any other paper. He (Ferguson) produced a paper; it was in my shop he produced it. He produced a paper and asked me if I would sign it. I told him I would not sign any paper without knowing what it was. He told me it was a will. He gave me liberty to satisfy myself it was a will. He did not want me to read it. I saw the words 'will and testament' in it—that satisfied me it would not do me any harm, and I put my name to it. My brother came in. I cannot say when my brother came in; he was not in when Ferguson produced to me the paper. I don't think my brother was in when I signed it. When my brother came in Ferguson said 'let your brother sign it too.' I did not see my brother sign the will. During the time Ferguson was in he spoke of the duty of making a will. I cannot tell what Ferguson did with the paper; I did not see him take it away. It was lying on the show case when I last saw it. I could not see him take it and put it in his pocket, as I took a chair from the room and went to work. * * * I don't know if his (Ferguson's) signature was on it when I signed it. I did not see Ferguson sign it. I won't swear that he said it was *his* will; but he said it was a will. I won't swear that he said it was his will, or not. I had no other business with him that day. He was only in a short time. My signature was made in my shop—a small shop, size 13x15 feet, I think. * * * He said it was the duty of persons to make a will. My brother was not in when Ferguson came in. He came in when Ferguson was there, I signed it (the will) first. I did not see my brother sign it; he must have signed it in the shop. When my brother came to sign, I went into a room off the shop for a chair to go to work, * * * I did not see Ferguson's signature on the paper—it might have been there. I don't know how I came to put my signature where it is—might have been from the way the paper was folded. Ferguson did not wish me to read the paper. I suppose I signed it as a witness. When my brother came in I was standing at the show case; I don't think he was present when I signed. Don't remember any conversation after my brother came in. If he signed it when I went into the room, I could not see him sign it. If I had looked I could have seen him sign it. I was in a position at no time after I left the show-case to see him sign it. Standing in any part of the shop, I could have seen him sign the will if I had looked. The only time I went into the room off the shop, was to get the chair. Had to go about ten yards to get the chair, and returned immediately. Ferguson was sitting in the shop outside the counter. * * * I am not prepared to say that my brother did not sign the paper while I was in the front shop. I will not swear that Ferguson's signature

was not there when he subscribed as a witness. I think my brother was not present when I signed; I am not positive."

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On cross-examination the witness said:—

"When I signed, I stood behind the show-case. My impression is, that I signed before my brother came in. When my brother came in, and came round to the end of the counter, Ferguson said, 'let your brother sign it too.' I left the paper on the show-case; and when my brother stepped up, I stepped away to get a chair. * * * I did not see my brother sign it at all, nor with the pen in his hand. I don't know whether my brother would have time to sign it while I was in the other room. If he picked up the pen he could have signed it while I was in the other room. I did not see my brother writing after I came in from the room. I did not see him with the pen at all. I am satisfied he stepped up to the show-case with the intention to sign. * * * Ferguson did not write his name in our presence. He did not put the seal on in our presence. He did not acknowledge his signature in our presence."

William McKeen, the other witness, states as follows:—

"I put my name to the paper at the request of Mr. Ferguson. He said to my brother, 'let your brother sign it also.' My brother was standing behind the show-case when Ferguson said 'let your brother sign also.' I don't remember seeing my brother sign it. I swear I did not see my brother sign it. It would be very hard for him to sign it without me seeing him if I was in the shop. I will not undertake to swear that he could not sign it without me seeing him. I will not say I was not in the shop when Mr. Ferguson came in. I have not a very distinct recollection of the circumstances. I don't recollect whether my brother was present when I signed. Ferguson did not produce any document to me, or in my presence. The paper was on the show-case, and I signed it when Ferguson was present. I cannot say where my brother was when I signed. I cannot say he went away from beside me. I cannot tell in what position, or where my brother was. * * * I don't remember any conversation—don't recollect Ferguson saying anything in reference to it."

On cross-examination, he said:—

"I don't remember seeing Ferguson sign the paper. Did not see him put the seal on. I cannot say the signature, 'Alex. Ferguson,' was on the paper when I signed it. For all I know, Ferguson's name might have been written afterwards. Ferguson did not, I think, point out the signature to me, and acknowledge it. When I came in the shop, the first I heard said was by Ferguson, 'let your brother sign it also.' My brother was then behind the show-case. He stepped away from where he was standing, and I stepped in. I did not know what I was signing, and no person told me."

June 17 and 18, 1880. *Thomson, Q. C.*, and *Wilkinson, Q. C.*, were heard in support of the appeal, and *Weldon, Q. C.*, and *G. G. Gilbert*, contra.

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The positions taken by counsel and the cases cited are fully discussed in the several opinions of the Judges.

Cur. adv. vult.

The following opinions were now delivered:

PALMER, J. This is an appeal from the decision of the Judge of Probates for the County of Northumberland, in which, on an application to have it proved in solemn form, he decided that the will of one Alexander Ferguson was not proved to have been properly executed. As the sole question in this case is one of fact, it is important, in view of the general law relating to appeals on questions of fact, to first determine the principle upon which this appeal is to be decided in that regard, and I think that the law in this particular is that we are bound to decide the case the same as if it was before us for the first time, and to entirely disregard the finding of the Judge in the Court below. In other words to give no weight to his finding, and in this respect this appeal differs from ordinary appeals on questions of fact, the general rules governing which are laid down in *Gray v. Turnbull*.¹ This is the effect of the latter part of sec. 47 chap. 52, of the Consolidated Statutes, which gives this appeal: The language of which is, "and upon the hearing of any such appeal the Supreme Court shall decide questions of fact from the evidence sent up on appeal, irrespective of the finding of the Judge of Probates in the Court below."

Then judging from the evidence so sent up, and disregarding the finding, was this will duly executed or not?

To decide this, I think we must determine the following questions, whether there is any, and what evidence of the due execution of it, and if so, is such sufficient to satisfy the court that it was properly executed; and then, is there any evidence to disprove that, and if so, what is the truth in regard to that question, having regard to all the circumstances proved in the case.

The proper execution of the will is made by sec. 5 chap. 77, Con. Stat., to be that it must be signed by the testator at the foot or end thereof, or such signature must be made or acknowledged by the testator in the presence of two or more witnesses, present at the same time, and such witnesses must attest and subscribe the will in the presence of each other and of the testator.

This will was unquestionably signed by the testator as direct-

¹L. R. 2 H. L. Sc. Ap. 58.

ed by the statute, for his signature is at the end, and also in the attestation clause, which is at the foot of the will and extends about one half way across the page, and the whole of it is embraced by a mark as below :

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"The said Alexander Ferguson this 30th day of April, A. D. 1879, sealed and delivered this instrument as and for his last will and testament, and we at his request, and in his presence, and in the presence of each other, have hereunto written our names as subscribing witnesses.

(Signed) CHARLES McKEEN,
" WILLIAM McKEEN."

"(Signed)
ALEX. FERGUSON, [L. S.]"

The whole will, except the signature of the witnesses was proved to be the handwriting of the testator.

Then, is there any evidence that it was signed or acknowledged by the testator in the presence of these two witnesses present at the same time ?

To determine this point it is important to know whether the testator's own statements, made in the will itself, and acts are evidence to prove this. I think they are, and that it may be proved by what is called internal evidence of the will itself, that is the appearance of the will as well.

Now what does the attestation clause prove ? It distinctly states that all the requisites of a legal execution of the will had been done and performed except only it omits to state that the testator had signed it. This omission, I think wholly immaterial, from the apparent fact that the testator had written his name in full in the first part of the attestation clause, which was of itself a sufficient signature to satisfy the statute. See *In the Goods of Casmore*;¹ *In the Goods of Walker*;² *In the Goods of Huckvale*.³

If the testator wrote the truth when he wrote that clause, it proves that he sealed and delivered that instrument as and for his last will and testament, and that the two witnesses, at his request and in his presence, and in the presence of each other, wrote their names thereto as subscribing witnesses. For if all this is not true, then the testator has deliberately concocted a paper and laid it away containing false statements, calculated

¹L. R. 1 P. & D. 656.²31 L. J. P. 62.³L. R. 1 P. & D. 375.

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to deceive the persons who were to administer his affairs after his death. If what is written is true then he must have acknowledged his signature in the presence of the two witnesses at the same time; for it is quite sufficient for a testator, after he has subscribed his name, and has then written an attesting clause declaring thereby that he had made and published the instrument as his will and had properly subscribed it, to ask the witnesses in his presence, and in the presence of each other to write their names thereto as subscribing witnesses, this being a sufficient acknowledgment of his signature.

The doctrine of the case of *Gwillim v. Gwillim*,¹ is that if a testator produces a paper, and gives the witnesses to understand that it is his will and gets them to sign their names, that amounts to an acknowledgment of his signature, if the Court is satisfied that the signature was on the will at the time. Sir Cresswell Cresswell, at page 205 says :—

“If it were necessary to have direct evidence that the name of the testator was on the will when he acknowledged it by asking them to witness his will, the proof of execution would fail, but that certainly is not necessary.”

Now if it be true as said by Lord Penzance in *Beckett v. Howe*² that we are at liberty to judge from the circumstances of the case whether the name of the testator was on the will at the time of the attestation, it is not likely that this testator who knew that there must be two witnesses to the will did not know that he must sign it before they did, and either sign or acknowledge it in their presence. In the present case these observations apply not only to the signature or acknowledgment of the testator, but also to the signing by the witnesses in the presence of the testator and of each other.

With reference to the signature of the testator, there can be no doubt but that it was there at the time the witnesses signed, for it is in the first part of the attestation clause, and there is no space or sign but that it was written in the order in which it appears, and we have it under the hand of the testator that these witnesses signed the attestation clause at his request, in his presence and in the presence of each other, and we have not to infer as Sir Cresswell Cresswell did that the testator knew that there had to be two witnesses, and that they must

sign in his presence and in the presence of each other. For we have it distinctly in his own handwriting that they did so, shewing at least that he intended that they should do so. And if they did not do so, he knew that he was getting them to attest to a falsehood.

It follows, I think that if the execution of a will can be proved by the internal evidence contained in it, a stronger case, than the one at the bar, can scarcely be conceived; and that the law is that it can be so proved, I have no doubt both upon principle and upon authority. Surely the acts and declarations of the testator are evidence of any fact necessary to support his will, and I can see no difficulty in supporting a will, that purported to be duly executed and signed by two witnesses, by the proof of the testator's written declarations to the witnesses that he had properly executed it, and the witnesses had properly attested it. See the case of *Hunt v. Hunt*;¹ *In the Goods of Archer*;² *In the Goods of Huckvale*;³ *In the Goods of Pearn*;⁴ and *Sly v. Sly*.⁵

In the case of *Inglesant v. Inglesant*,⁶ Sir J. Hannen says:—

"The peculiarity of the case is that the signature of the deceased was put to the will before one of them (the witnesses) came into the room. Both agree that Mrs. Lee, in the presence of the testatrix, upon the second witness coming into the room, requested him to put his name under the name of the testatrix; both also agree that the testatrix did not say anything or do any act in reference to the will after the two witnesses were there, and consequently the question turns upon this, whether the words used by Mrs. Lee can be taken to be the words used by the testatrix. The authorities abound which show that if the words used by Mrs. Lee had been spoken by the testatrix, namely, an invitation to the witnesses to put their names under the signature of the testatrix, that would have been an acknowledgment sufficient to render the execution valid."

And the law on this subject may be thus stated, that in case a testator asks the proper witnesses to sign as witnesses a paper that he has already properly subscribed for a will, and they do so, this is sufficient acknowledgment of the subscribing to satisfy the statute, although the witnesses do not know what the instrument is nor that the testator has signed it. In such a case, however, the evidence of such witnesses would have to be supplemented by proof *aliunde*, that the testator's

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¹L. R. 1 P. & D. 209.
²L. R. 2 P. & D. 222.

³L. R. 1 P. & D. 375.
⁴L. R. 1 P. D. 70.

⁵L. R. 2 P. D. 91.
⁶L. R. 8 P. & D. 175.

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signature was to it when he so asked them to sign, for, without this, in such a case the court would not infer that the signature was there at that time, but might have been put there afterwards, and therefore it would not be proved that what he acknowledged was a will duly subscribed. If, however, the testator called it his will to both witnesses, or asked both witnesses to witness his will, or both witnesses saw what purported to be the testator's signature on the paper at the time they signed, either of these things would be sufficient without any further proof that he had then signed it, the courts holding that from such facts or statements it would be inferred that the testator's signature was there at the time. I think the first proposition is proved by the law as laid down in the case of *Inglesant v. Inglesant* before referred to. In that case all that was said by Mrs. Lee in the presence of the testatrix was to ask witness to put her name beneath that of the testatrix, and the case decides that Mrs. Lee stating this was equivalent to the testatrix doing so. After the second witness came into the room Mrs. Lee asked him to put his name under the name of the testatrix, and he did so. Not another word was said that the witness heard. On this state of facts, Sir J. Hannen says, that the authorities abound showing that if these words were used by the testatrix, namely, an invitation to the witnesses to put their names under the signature of the testatrix, that would have been an acknowledgment sufficient to make the execution valid on the mere question as to the sufficiency of the testatrix's acknowledgment of her signature to the will.

As to the second witness, William McKeen, supposing it to have been unquestionably established that the testator had before then properly subscribed the will, how could the case I have referred to be distinguished from this? For after the first witness to this will had signed under the signature of the testator, (and if what the attestation clause states is true, and looking at all the facts proved, and this will itself, I have no doubt in my mind but what is so stated is true and such first witness had so signed in the presence of such second witness), the testator asked such second witness, not only to put his name under the testator's, but also under the name of the first witness, and therefore, according to Sir James Hannen, the

authorities abound to shew that this was sufficient acknowledgment to make the execution valid. See judgment of Sir J. P. Wilde in *the Goods of Huckvale*.¹

If this is good law, and upon looking into the many cases on the subject both English and American, there can, I think, be no doubt of it, [See *Hogan v. Grosvenor*;² *Tilden v. Tilden*;³ *White v. Trustees British Museum*;⁴ *Wright v. Wright*;⁵ *Johnson v. Johnson*;⁶ *Dewey v. Dewey*],⁷ it is clear that the acknowledgment in this case is sufficient.

The undisputed facts are that the testator had himself written all the will, and had added the attestation clause, and, as I have shewn, it must have been sufficiently signed, for his name, written by himself in full, is in the attestation clause itself. He then produces it to the first witness, asks him to sign it, who said he would not without knowing what it was, when the witness looked at it and saw the words "will and testament," and then signed the attestation clause. The testator spoke of the duty of making a will. This took place in the witnesses' shop, a small room 16x14 feet. When such witness so signed, the will was lying on the show-case on the counter, and he was on the inside of the counter. After he signed, the testator said, "let your brother sign it also," whereupon he stepped up to the counter. The first witness made room for him and he immediately signed it. The testator not being in the shop more than six or seven minutes altogether.

Surely, if it be the law as laid down by Sir J. Hannen, that an invitation to sign as a witness is a sufficient acknowledgment this is sufficient.

The only question remaining is, whether these witnesses both subscribed their names in the presence of the testator and of each other. If I am right that the declaration of the testator is evidence, then we have his declaration in his own handwriting in the will itself, that they did, and we have them both putting their names to that declaration which, I take it, they each must have seen, and we have the fact that the testator knew that their doing so was necessary, as in no other way can

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¹L. R. 1 P. & D. 378.
²10 Metcalf 56.
³18 Gray 110.
⁴6 Bing. 310.

⁵7 Bing. 457.
⁶1 C. & M. 140.
⁷1 Metcalf, 349.

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I account for his stating these facts in the attestation clause. As it would follow that if it was not done, he would know that all his trouble would be fruitless, could any person, in the absence of any evidence to the contrary, doubt that it was so done? I think this is what is meant when it is said "that the doctrine of *præsumuntur rite esse acta* will be applied to such cases. For looking through the numerous cases on the subject, it will be seen how important is considered the fact that the will and attestation clause are in the writing of the testator himself.

What are the facts to be proved? It is that the witnesses subscribed in the presence of the testator and of each other. The statute does not require either that the testator or the other witnesses should actually see each witness subscribe. All the statute requires is, that such subscribing should be in their presence; that is, that they should be present and might have seen them subscribe if they chose. See *Shires v Glasscock*; ¹ *Todd v. Winchelsea*; ² *Casson v. Dade*.³

Then is there sufficient evidence to prove this without reference to what the witnesses themselves say? As to the circumstances of the attestation, as I before pointed out, we have the proof in the will itself that these witnesses at his request had subscribed it as witnesses in his presence and in the presence of each other. This, I think, would be sufficient of itself, as the paper shews the names of two well known competent witnesses which, I think, is at least equivalent to evidence that the testator made the will, and these two witnesses had so subscribed in his presence and in the presence of each other; and if this is the only thing to be proved to make it a valid will, I cannot see why this does not prove it; and I think the authorities fully support this. It is only on this principle that the case of *Sly v. Sly*⁴ can be supported. Mr. Best, in his work on Evidence, sec. 363, says: "The statutes" (naming them) "require wills, etc., to be in writing and executed with certain formalities, etc. The courts have in many instances applied the maxim *præsumuntur rite esse acta* to the execution of wills, and, as a general principle, they lean in favor of a fair will," &c.

Then, as to there being sufficient *prima facie* evidence of the due execution of this will:

¹ 2 Salk. 688.

² 1 M. & M. 12.

³ 1 Brown, C. C., 99.

⁴ L. R. 2 P. D. 91.

A synopsis of the evidence of the two witnesses, who were brothers, as far as it relates to the question whether William was present when Charles subscribed the will, is substantially as follows:—

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Charles says—

"The testator came in and produced the will and asked me to sign it. He gave me to understand that it was a will. I looked at it and saw the words 'will and testament.' He said it was the duty of a person to make a will, etc. My brother was not in then. He came in when the testator was there. The testator was not there more than six or seven minutes. He said, 'let your brother sign it too.' I signed it first, etc. Testator did not wish me to read it. When my brother came in I was standing at the show-case. Don't think he was present when I signed. Don't remember any conversation after my brother came in. I think my brother was not present when I signed. I am not positive," etc.

On cross-examination he says—

When I signed I stood behind the show-case. My impression is I signed before my brother came in. When my brother came in and came around the end of the counter, the testator said, 'let your brother sign it too.' I left the paper on the show case and when my brother stepped up I stepped away. I did not see my brother sign, or the pen in his hand. I am satisfied that he stepped up to the show-case with the intention to sign. Don't remember whether I gave the pen to my brother or not, or whether I laid it down. I cannot swear that I did not give the pen to my brother."

William McKeen says—

"I put my name to the will at the request of the testator. He said to my brother, 'let your brother sign it also.' When I came in my brother was behind the show-case. When testator said, 'let your brother sign also,' my brother was standing behind the show-case. I did not see my brother sign it. Don't remember seeing my brother sign it. I swear I did not see my brother sign it. Testator asked my brother to let me sign it too. It was very hard for him to sign without my seeing him if I was in the shop. I will not undertake to swear that he could not sign it without my seeing him. I will not say that I was not in the shop when testator came in. I have no distinct recollection of the circumstances. I don't know whether my brother was present when I signed. He was present when testator said 'let your brother sign also.' The will was on the show-case, and I signed it. Testator said 'let your brother sign too,' and I signed it soon after; I would naturally sign it at once."

On cross-examination, he says—

"My brother stepped away from where he was standing and I stepped in."

I have only set out the evidence relating to whether the

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second witness was present when the first one signed, as I think that is the only point at all doubtful.

I gather from the whole evidence of these witnesses, that they are at least unwilling to support the will, and, while I do not judge them dishonest, they are at least very forgetful, and therefore I think their opinions were, if evidence at all, to be taken with a great deal of allowance.

Charles McKeen in his cross-examination swears that he did not see the pen in his brother's hands, and yet, in his re-examination, he will not swear, but that he himself gave him the pen; and on the important point, whether the last witness was in the shop when the first witness signed, while they both say that in their opinion he was not, yet they neither will swear that he was not. This amounts to no more than swearing that they cannot remember whether he was or not.

I think the effect of the whole of William's evidence is, that he cannot say he did not see his brother sign his name, which was not at all necessary if he was present when it was done, for, although William says, "I did not see my brother sign," yet he adds, "I don't remember seeing my brother sign it"; then adds, "I will swear I did not see my brother sign it"; and he states afterwards, "I have no recollection of the circumstances. I will not say I was not in the shop when the testator came in." And, as have I before pointed out, he states, "that he would not swear that his brother did not hand him the pen." Whether he saw his brother sign or not, from all this it is clear to my mind, that he was present when his brother did sign, and he does pretend to state that he was not; and, if this is so, Charles did sign in the presence of William, and this is all the attestation clause affirms on this point, and all that the statute makes necessary.

From all this I gather that when the testator produced the will to Charles McKeen and told him to witness it, he placed it on the show-case which stood on the counter in the shop where he signed it, and while there, and from the fact that the first witness was still standing behind the counter and the other witness was coming around the end of it when the testator asked him to let the second witness sign, it is clear that such second witness had been long enough in the shop to get to

the end of the counter, which would naturally take more time than it would for the first witness to sign his name, I would infer that it was at least likely that he was in the shop when the first witness signed. And as I think I am bound to investigate and weigh all the circumstances and this proof, and am bound to judge from them all whether or not the statement in the attestation clause is true or not, remembering that the true rule is that as there is nothing to show that this will was not a fair one, and that as the testator was unquestionably competent to make it, and as there is sufficient evidence to support it, I should give the person seeking to support it the benefit of the maxim, *omnia præsumuntur rite esse actu*. See *Vinnicombe v. Butler*; *Lloyd v. Roberts*;² *In the Goods of Torre*;³ and if under all the circumstances, giving due weight to this presumption, I am not reasonably satisfied that the will was properly executed, I ought to pronounce against it, for I think the court has no right to deprive the heirs or next of kin of the property without it is reasonably satisfied that there is a good will. See *Cresswell v. Jackson*.⁴

Taking this rule as my guide, and speaking for myself, I am satisfied that this will was acknowledged by the testator after it had been signed by him, and that it was subscribed by these two witnesses in the presence of each other, and in the presence of the testator. And this case is in my opinion a much stronger case than *Wright v. Rodgers*.⁵

In that case Lord Penzance says:—

“It is proved that the will was signed by the testator in the presence of two witnesses, an attorney and his clerk; that the attorney was a gentleman of long experience, and that the will had at the time a perfect attestation clause. *Prima facie*, therefore, there cannot be a stronger case in which the Court might presume that the will was duly executed.”

In this case I can say that when the will was executed the testator was in perfect health, and that he had not only written the will itself, but also the attestation clause full and complete as to both witnesses signing in the presence of the testator; which shows that the testator knew what was required to make a good execution, and the first witness swears that the testator

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¹ 34 L. J. P. N. S. 18.
² 12 Moo. P. C. 168.
³ 8 Jurist N. S. 494.

⁴ 4 F. & F. 1.
⁵ L. R. 1 P. & D. 678.

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told him that it was a will, and asked him to witness it. *Prima facie* there cannot be a stronger case in which the Court might presume that the will was properly executed. Surely the probability is very strong that it was executed just as the testator by his statement in the attestation clause clearly intended that it should be, and which both witnesses in that clause, which they read, and must have seen when they signed, declared they had done; that is, that they had signed it in the presence of the testator and of each other. Such a very strong presumption and probability ought not to be broken down merely because the witnesses cannot recollect that they were so present; and even if they had sworn that they were not, still I think that I would have to consider whether I could believe them, under all the circumstances. This is what was done in *Wright v. Rodgers*, with reference to other witnesses.

The case of *Lloyd v. Roberts* proceeded on the same principle. In that case the only attesting witness examined swore that the will was not properly executed. This was not allowed to prevail against the fact of the testator knowing how the will should be executed, and against the will itself.

In the case, *In the Goods of Rees*,¹ the will was admitted to probate although the attesting clause was informal, and the witnesses could not recollect whether the will was properly executed or not, and in *Myers v. Gibson*,² where both attesting witnesses swore that their signatures were forgeries, and they were contradicted by the attorney who drew the will, the will was considered proved.

Upon the whole I think this appeal ought to be allowed, and the Probate Court of the County of Northumberland enter a decree that the will was duly proved in solemn form and grant probate thereof, and that the decree granting probate to the other will be vacated, and the costs of all parties to this appeal be paid out of the estate.

DUFF, J. By chapter 77, section 5, of the Consolidated Statutes, it is enacted that no will shall be valid unless certain formalities have been observed in the execution of it.

By that section every will is required to be in writing, and to be *signed* by the testator (or by some other person in his

¹ 44 L. J. 56.

² 14 W. R. 901.

presence and by his direction) in the presence of two or more witnesses who shall be *present at the same time*, and who shall, *in the presence of the testator and of each other*, attest to its having been so signed in their presence; and, in proof of their having so attested it, shall subscribe their names thereto. Or otherwise the signature of the testator to it must be *acknowledged* in the presence of a like number of witnesses, who in the same manner, shall, in the presence of the testator and of each other, *attest* to such acknowledgment, and, in evidence of their attestation, shall subscribe their names as witnesses thereof.

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"No particular form of attestation is necessary, but the act done by the witness must be *intended by him to evidence his attestation of the will*." Per Sir J. Hannen, *In the Goods of Eynon*.¹

"The statute not only requires them to attest, but to subscribe. The subscription is the evidence of the previous attestation. It is as difficult to see how they can subscribe *in proof of their attestation*, before they have attested, as it is to attest before the signature of the testator has made it his written will. The controlling consideration is, that *the statute in terms requires not only that the witnesses shall attest his will, but also that they shall subscribe it in his presence*." Per Gray, J., in *Chase v. Kittredge*.²

The 5th section of our Act differs from the 9th section of the Imperial Statutes, 1 Vic. ch. 26, only in this respect, that the former requires the attestation and signatures of the witnesses to be made by them, not only in the presence of the testator, but also in the presence of each other, whilst the latter does not. In the absence of an express provision in the English Act to that effect, the decisions in England on the subject have been conflicting. *Vide* per Sir Herbert Jenner Fust, 3 Curteis, 659; *Faulds v. Jackson*;³ *Casement v. Fulton*.⁴ But here there can be no question as to the necessity of the witnesses attesting and subscribing in presence of each other, because our statute expressly requires them to do so.

The will and attestation clause, with the exception of the signatures of the witnesses, were shewn, in this case, to have been entirely in the handwriting of the testator. The last clause of the will is in the usual *testimonium* clause attached to deeds and other instruments under seal "In witness whereof I have hereunto set my hand and seal," etc.; under which, on

¹ L. R. 2 P. & D. 62.
² 11 Allen, Mass. 53, 54.

³ 6 Notes of Cases Suppl. 1.
⁴ 45 Moo. P. C. 120.

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the right side of the page is the signature of the testator, opposite a seal. And, on the left side is the following attestation clause:—

“The said Alexander Ferguson, on this thirtieth day of April, A.D. 1879, *sealed and delivered* this instrument as and for his last will and testament: and we, at his request, and in his presence, and in the presence of each other, have hereunto written our names, as subscribing witnesses.

CHARLES McKEEN.
 WILLIAM McKEEN.”

This is not, as will be observed, by any means a perfect attestation clause. It describes with much care and particularity the observance of certain solemnities which were wholly unnecessary, whilst it omits to notice the one, of all others, which is absolutely essential to the proper execution of a will. It is not stated that the testator had *signed* the instrument in presence of the witnesses; or, indeed, that his *signature* was to the document at all when the witness signed it.

It is unnecessary for me to discuss now, whether or not, in the absence of any direct testimony on the subject, we would be at liberty to infer as a fact, under an attestation clause in this form, that *the testator signed this will in the presence of the witnesses*; because we have the evidence of both the witnesses that he did not; and their testimony is not sought to be impugned.

But the counsel for the appellants contend that there is sufficient evidence of an *acknowledgment* of his signature, by the testator to satisfy the statute. That is the only question which we have to decide. The solution of it, however, involves the consideration of several distinct points. First: Was the testator's signature subscribed to the will before the witnesses signed it? Second: Did he make what the law regards as a sufficient acknowledgment of it in presence of both witnesses? Third: Did the witnesses properly attest to such acknowledgment; that is to say, subscribe their names as such witnesses, not only in presence of the testator, but also in presence of each other?

As to the first point: It is clearly not necessary to prove, by *direct testimony* that the testator's signature had been subscribed to the will before the witnesses signed it. This fact will some-

times be presumed from circumstances, and from the appearance of the will itself: *Gwillim v. Gwillim*.¹

That case was decided upon the authority of *Cooper v. Bockett*,² and it seems to have gone the extreme length which the law will warrant in the application of the maxim *omnia præsumuntur esse rite acta*, to cases of this nature. *Cooper v. Bockett* was itself first doubted by the profession; and its authority was, for sometime actually disputed by the officials in Doctors Commons. See the report of *Gwillim v. Gwillim* in 29 L. J. N. S. 31. And the application of the latter case, in subsequent cases, seems to have been restricted as much as possible: *Vide In the Goods of Hammond*,³ *In the Goods of Pearson*.⁴ And when constrained to follow it, other Judges have spoken of it in anything but terms of approval: *Beckett v. Howe*.⁵

There is no doubt, however, that *Gwillim v. Gwillim* is recognized in the subsequent cases as law. And the result of all the cases on the subject was stated by Sir J. P. Wilde, *In the Goods of Huckvale*,⁶ to be—

"That where there is no direct evidence one way or the other upon the point, but a paper is produced to the witnesses and they are asked to witness it as a will, the Court may, independently of any positive evidence, investigate the circumstances of the case, and may form its own opinion from the circumstances, and from the appearance of the document itself, whether the name of the testator was or was not upon it, at the time of the attestation."

But this case is distinguishable in many important features from *Gwillim v. Gwillim*, and I do not feel at all sure that we are warranted in presuming, either from circumstances or from the appearance of the will, that the testator's signature had been subscribed to it when the witnesses signed it.

Both the witnesses to it were examined, and there is no failure of memory on their part. They both give minute details of what occurred when they were asked to witness the document. There is the "direct evidence" of each that he did not see the testator's signature to it; and that the testator *did not* produce it to him and request him to witness it as his will. Their testimony, so far as it relates to the question under con-

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¹29 L. J. N. S. P. & M. 31.

²4 Moo. P. C. 419.

³39 W. & Tr. 90.

⁴33 L. J. N. S. P. & M. 171.

⁵L. R. 2 P. & D. 1.

⁶L. R. 1 P. & D. 375.

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sideration was as follows: Charles McKeen swore that the testator in his, the witness's shop, produced a paper to him and asked him to sign it:

"I told him," he continued, "I would not sign any paper without knowing what it was. He said it was a *will*. He gave me liberty to satisfy myself it was a will. He did not want me to read it. I saw the words 'will and testament;' that satisfied me it would not do me any harm, and I put my name to it. I cannot say when my brother came in. *He was not in when Ferguson produced to me the paper.* I don't think my brother was in when I signed it. * * * *I don't know if his (Ferguson's) signature was on it when I signed it. I didn't see Alexander Ferguson sign it.* I won't swear that he said it was *his will*; he said it was a *will*. I won't swear that he said it was his will or not. On his cross-examination he said, *I did not see Ferguson's signature to the will. He did not write his name in my presence.*"

When the witness had satisfied himself that the document he was asked to sign was a will, he took it and placed it on the show-case in his shop, and then signed his name to it as a witness. Immediately after he had signed, and whilst he was still standing there, his brother William entered the shop, and the testator, addressing Charles McKeen, told him to let his brother sign also. Charles, thereupon, stepped back from the show-case, to permit of his brother approaching it, and, either handed him the pen, or left it on the show-case for him to sign.

William McKeen testified that, on coming into the shop, he saw his brother Charles standing at the show case, and heard the testator say, "let your brother sign also." He further said:

"At the request of Mr. Ferguson I put my name to the paper. I don't remember seeing my brother sign it. *I swear I did not see my brother sign it.* * * * Ferguson did not produce any document to me. The paper was on the show-case and I signed it. * * * *I didn't know what I was signing, and no person told me.*"

Again he said—

"*I cannot say that the signature, 'Alex. Ferguson,' was on the paper when I signed it. For all I know, Ferguson's name might have been written afterwards.* When I came in the shop, the first I heard said was by Ferguson, 'let your brother sign it also.' My brother was then behind the show-case. My brother stepped away from where he was and I stepped in."

There is nothing in the attestation clause which would suggest to us that the will had been *signed* by the testator. On the contrary, the fair inference to be drawn from that clause

is, that the *sealing* of the will and not the *signature* to it, was what the testator regarded as important. The only reference made to his signature is in the *testimonium* clause, where he speaks of having affixed his *hand* and seal. And were it not that I find him using language elsewhere in relation to the execution of the will, the value of which he evidently did not understand or appreciate, I would regard this reference to his signature as important. He would appear to have copied the formal conclusion and attestation clause from some other will or document; and he seems to have done so mechanically, without understanding the meaning or effect of the language which he copied. In the attestation clause the will purports to have been executed by the testator in the presence of two witnesses, *who in his presence and in presence of each other*, wrote their names as subscribing witnesses. It is questionable if he knew that the law required the will to be *signed* or acknowledged in presence of *two* witnesses, both present at the same time; and it seems clear that he did not understand that it was necessary for the witnesses to subscribe their names in each others presence; because, when he asked Chas. McKeen to witness the document, the other witness was not present or even in the shop. It seems to have been by the merest accident, that William came into the shop at all; and when he did come, it was too late, for his brother had already signed.

Without expressing any decided opinion as to whether or not the testator's signature was subscribed to the will before the witnesses signed it, I will assume, for the purpose of the case, that it was. And I proceed to the consideration of the second point. Did the testator make a sufficient acknowledgment of it in presence of both witnesses?

No formal acknowledgment of his signature by the testator is necessary; it is sufficient if there be something tantamount to an acknowledgment of it. Speaking on that subject, Mr. Williams (1 Wms. on Exors. 7 ed. 88), says:—

"The result of the cases appears to be that, where the testator produces the will, *with his signature visibly apparent on the face of it, to the witnesses*, and requests them to subscribe it, this is sufficient acknowledgment of his signature; but *not where they were unable to see the signature, and the testator merely calls them in to sign, without giving them any explanation of the instrument they are signing.*"

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If he produces a document to them *telling them that it is his will*, or giving them to understand that it is his will, the law will presume that his signature is to it, because it could not become his will until he had signed it. And such production, accompanied by a request to witness it, is equivalent therefore to an admission or acknowledgment that the signature thereto is his, although the witnesses themselves may never have seen it. But unless the testator's signature is visible to the witnesses themselves on the face of the instrument; or the fact of its being subscribed, is in some manner directly or indirectly brought to their knowledge *before they sign it*, there can clearly be no acknowledgment of his signature by the testator to which the witnesses can certify or attest.

And on this point, as to the sufficiency of the acknowledgment, neither the attestation clause nor the will itself will afford us any evidence, or any foundation upon which to rest an inference of the fact. In the *testimonium* clause the testator declared that he had set his *hand* and seal to the document; in the attestation clause he affirms that *he sealed and delivered it in presence of the witnesses*. We are not justified in drawing an inference from this language of the testator, entirely different from what the language itself imports. We are not warranted in saying that the testator's statement is *untrue*; that he did not do what he tells us he did; that he *did not set his hand to, or seal and deliver the instrument in presence of the witnesses*, but that he did something else, altogether different, in their presence; that is to say, he acknowledged his signature.

The only evidence we have as to the acknowledgment is that of the witnesses, Charles and William McKeen. Possibly enough may be gathered from the testimony of Charles McKeen to establish acknowledgment of his signature by the testator in his presence; but there was clearly no acknowledgment of it in presence of William McKeen. The latter swore that the testator produced no paper to him; that he did not know what he was signing and no person told him; and that, for anything he knew to the contrary, the testator's signature might have been subscribed to the document after he signed it as a witness. There was no acknowledgment, or anything tantamount to it,

in presence of William McKeen. And it is impossible for us to assume that the witness *attested* and *certified* to a fact, about which he swears himself he knew nothing; and without any other evidence that he was aware of its existence. He neither knew nor was told that the document he signed was the testator's will, or that the testator's signature had been subscribed to it when he signed it.

Thus, *In the Goods of Pearson*,¹ where the witnesses signed their names to the foot of a paper at the request of the deceased, but did not know when they signed it, whether or not the deceased's signature was to it; and where they swore that they were not even aware, until after his death, that the document which they had subscribed was a will, probate of the document was refused. To the same effect is *Fischer v. Popham*²

And, upon the point now under consideration, the leading authority of *Hott v. Genge*³ is conclusive. That cause was twice argued before the judicial committee of the Privy Council; and, after consideration, the Lord Chancellor (Lord Lyndhurst) delivered the unanimous judgment of the Court, consisting of himself, Lord Brougham, Lord Chief Justice Denman, Lord Abinger, Lord Campbell, Baron Parke, Vice Chancellor Knight Bruce, and the Right Honorable Dr. Lushington, as follows:—

"In this case we do not think it necessary to decide the question as to whether or not the instrument was signed before witnesses were called in; but, assuming that it was signed by the deceased before the witnesses were called in, we are of opinion that the mere circumstance of calling in witnesses to sign, without giving them any explanation of the instrument they are signing, does not amount to an acknowledgment of his signature by the testator."

Beckett v. Howe,⁴ which was so much relied on by the appellants, is distinguishable. In that case Lord Penzance arrived at the conclusion on the evidence, which there was no direct testimony to contradict, that the testator had given both the witnesses to understand that it was his will which they were signing. It is therefore within another class of authorities.

Hott v. Genge is exactly in point as regards the witness, William McKeen; and there has clearly not been any sufficient

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¹ 23 L. J., N. S., P. & M. 171.
² L. R. 2 P. & D. 246.

³ 4 Moo. P. C., 286.
⁴ L. R. 2 P. & D. 1.

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acknowledgment of his signature by the testator in presence of both the witnesses as the law requires.

Upon the third point also, I am of opinion that there has not been a proper attestation by the witnesses *in presence of each other*, as required by our statute. In the face of the positive oath of William McKeen, and for the reasons which I have given in discussing the second point, I think that we cannot invoke the aid of the attestation clause, as affording us a ground for inferring that the witnesses attested to the testator's *acknowledgment* of his signature in presence of each other.

For these reasons I think that this appeal must be dismissed with costs; but, under the circumstances, I think that the costs should be paid out of the estate.

ALLEN, C. J. The question in this case is, whether a paper propounded as the will of Alexander Ferguson, was duly executed as such.

The grounds, on which probate was refused, were,—1st. That the deceased had not acknowledged his signature in the presence of both the witnesses. 2nd. That the witnesses did not subscribe their names in the presence of each other, as required by statute.

The will not having been signed by the deceased in the presence of the witnesses, and there being no evidence that either of them saw his signature, the first question to be considered is, whether the court would be justified in presuming from the circumstances, that the will was signed by Ferguson before he took it to McKeen's shop, and asked him to witness it? Notwithstanding the informality in the attestation clause, from the absence of the word "signed," I think the court would be justified in so presuming. It will hardly be presumed that when Ferguson asked Charles McKeen to sign the paper as a witness, he did not know that McKeen was to witness his (Ferguson's) signature to it—to attest an act which he had already done. It is very improbable that Ferguson could have supposed that the witnesses might sign first, and that he could take the will away and sign it at a future time. He states in the *testimonium* clause, "In witness whereof I have hereunto set my hand and seal on this thirtieth day of April, 1879."

According to the testimony of the witnesses, he neither signed the will nor affixed a seal to it while he was in the shop; but it is quite consistent with their testimony that it was signed before he brought it there. Unless, therefore, we can presume anything so improbable as that when he took the will to McKeen's shop and asked him to witness it, he had not signed it, and did not sign it while he was there, but signed it at some future time, not in the presence of any witness, I think one would be justified in coming to the conclusion that he had signed it before he went to the shop; that it was then a complete instrument so far as he himself could complete it.

The principle to be gathered from the cases is, that if a testator produces a paper and asks persons to sign it as witnesses and gives them to understand that it is his will, it is not necessary to have direct evidence that his signature was on the paper when he asked them to sign it; but the court is at liberty to judge from all the circumstances of the case whether his signature was there at the time or not.

Having come to the conclusion that there is evidence from which it may be presumed that Ferguson had signed the will before he went to McKeen's shop, the next question is, whether he acknowledged his signature to the witnesses? On this point, there is a material difference between his statement to, and acts in presence of, Charles McKeen, when he only was in the shop, and what he afterwards said to, or in the presence of, William McKeen when he came in. He (Ferguson) not only allowed Charles to examine the paper sufficiently to satisfy himself that it was a will which he was asked to witness, but he also told Charles that it was *a* will, or *his* will, (I think it is not material which word he used), and spoke of the duty of persons to make wills. This, according to the authorities, was a virtual acknowledgment of his signature by Ferguson, even though Charles McKeen did not see the signature.

In *Ilott v. Genge*,¹ Sir H. Jenner Fust, speaking on this point, says:—

“It is not necessary that a testator should state to the witnesses that it is his signature: the production of a will by a testator, it having his name upon it, and a request to the witnesses to attest it,

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would be a sufficient acknowledgment of the signature under the present statute."

In *Blake v. Knight*,¹ the deceased did not sign the will in presence of the witnesses, nor did he formally acknowledge his signature to them, nor did they see his signature upon the will when they subscribed; but they admitted that he spread the will open on the table before him, and said it was his will, and that he had made a mistake in it, which he had rectified, pointing out the place to them, and read to them the words—"This is the last will and testament of me, Edmund Blake." It was held that it was not necessary to have positive affirmative testimony of the acknowledgment of the signature, but that the court must take all the circumstances into consideration, and judge from them collectively, whether there was not at least an acknowledgment of a signature clearly existing on the face of the will at the time of the attestation; and it was held, that there was such an acknowledgment.

In *Keigwin v. Keigwin*,² the testatrix produced a paper to two persons, and requested them to sign it—her signature being affixed to it at the time—but the paper was so folded that they only saw her signature. It was held that this was a sufficient acknowledgment, and Sir H. Jenner Fust said—

"It is not necessary that the party should say in express terms, 'that is my signature'; it is sufficient if it clearly appears that the signature was existent on the will when she produced it to the witnesses, and was seen by the witnesses when they did, at her request, subscribe the will."

So far as relates to the witness, Charles McKeen, I think there was a virtual acknowledgment by Ferguson of his signature. But the facts are very different with respect to the other witness, and I am unable to discover any evidence which would amount to an acknowledgment of the signature to him.

The conversation between Ferguson and Charles McKeen about the paper being a will, took place before William McKeen came into the shop. He did not hear Ferguson say anything in reference to it, except the statement to Charles, "let your brother sign it too," made at the time he (William) came into the shop, at which time Charles was behind the counter, with the will before him on the show-case, and had either signed it,

¹ 1 Vict. c. 26.² 3 Curt. 607.

or was in the act of signing it. He stepped away, and William went up to the show-case and signed his name underneath his brother's. He (William) did not know whether Ferguson's signature was on the paper when he signed it, or not; and he said he did not know what he was signing, and that no person told him what it was.

If this evidence is reliable, where is there anything like an acknowledgment by Ferguson of his signature to William McKeen?

As the statute requires that the signature shall be made or acknowledged by the testator in the presence of the witnesses, it would seem that the Legislature intended that the witnesses should see the signature; for, as said by Sir Herbert Jenner Fust in *Plott v. Genge*:¹

"How is it possible that a signature should be acknowledged (for it is not the will, but the *signature* which is to be acknowledged), unless the signature is exhibited to the witnesses? The statute requires that the signature should be attested. The construction which I should be inclined to put upon this clause is, that the production of the will with the signature to it, and requesting the witnesses to attest, and their attesting and subscribing the will, would be sufficient."

The learned Judge evidently meant that it would be sufficient if the witnesses saw the signature. In that case, the witnesses did not see the testator's signature: he told them that he wanted them to sign a paper for him, which they did in his presence, he pointing out to them the place where they were to sign; but he did not tell them what the nature of the paper was. Sir Herbert Jenner Fust held that this was not an acknowledgment of the signature either expressly or virtually, and he pronounced against the validity of the will. His judgment was affirmed on appeal by the Privy Council (4 Moo. P. C. 265), and the Lord Chancellor, delivering judgment, said:

"Assuming that it (the will) was signed by the deceased before the witnesses were called in, we are of opinion that the mere circumstance of calling in witnesses to sign, without giving them any explanation of the instrument they are signing, does not amount to an acknowledgment of the signature by the testator."

And see to the same effect, *Fischer v. Popham*;² *Pearson v. Pearson*.³

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¹ 3 Curt. 175.² L. R. 3 P. & D. 246.³ L. R. 2 P. & D. 461.

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Now, wherein does the present case, so far as relates to the witness William McKeen, differ from *Ilott v. Genge*? He neither saw Ferguson's signature, or at all events he could not say whether his signature was there or not; neither did Ferguson acknowledge his signature, nor say what the paper was that McKeen was requested to sign. He signed his name in entire ignorance of the nature of the paper or of the particular object for which he wrote his name. I say the *particular* object, because he must have supposed that he signed as a witness to something. Then, what did he "attest"? Not Ferguson's signature, unless he saw it, or was made aware that the paper was his will. Can a person attest a fact unless he has a knowledge of its existence? The witness must do more than sign, he must attest: he must be a witness to some act done by another person, which, by affixing his own name, he affirms to be true and genuine. In *Cooper v. Bockett*,¹ counsel in arguing on the meaning of the word "attest," said that it meant that the witnesses attest a paper that had been declared a will; to which Parke, B., assented, saying, 'It must mean that they attest a paper which he (the testator) declares to be his will.' The fact that a sufficient acknowledgment of the signature may have been made to Charles McKeen, not in the presence or hearing of William, cannot supply the defect; for the acknowledgment must be made in the presence of two witnesses, present at the same time.

In the goods of Pearson,² the circumstances were very similar to those in *Ilott v. Genge*. The deceased requested the witnesses to write their names at the foot of a paper, which they accordingly did, but the paper was so folded that they could not, and did not, see what the nature of it was, and they were not aware that the name of the deceased was signed to it, nor that it was a will till after his death. Sir J. P. Wilde held that it was not duly executed.

So, *In the goods of Swinford*,³ where the deceased requested the witnesses to put their names to a paper, but did not state what it was or refer to its signature, and they could not say whether his signature was to the paper or not when they signed, probate was refused.

¹ 4 Moo. P. C. 482.

² 10 Jur. N. S. 372.

³ L. R. 1 P. & D. 630.

In that case, the evidence was of the same character, as the evidence of William McKeen in this case. There was no positive evidence that the testator had not signed the will; but the witnesses could not say whether his signature was written to it or not, when they attested. And so it was in the case of *Gwillim v. Gwillim*.¹

In *Inglesant v. Inglesant*,² the only question was, whether a request by a third person to the witness, in presence of the testatrix, to sign his name under her signature was equivalent to a request by the testatrix, and therefore a virtual acknowledgment of her signature? And it was held that it was so. There the witness saw the testatrix's signature at the time he signed, which distinguishes that case from the present one.

There is a class of cases which decides that where the testator informs the witnesses that the paper, which he wishes them to sign is his will, that amounts to a virtual acknowledgment of his signature, even though the witnesses do not see it, provided his signature is there at the time. To this class belong *Blake v. Knight*;³ *Gwillim v. Gwillim*;⁴ *Beckett v. Howe*;⁵ *In re Pearn*.⁶ The present case does not come within that principle, if the testimony of the witnesses is correct, as to what took place in William McKeen's presence, or hearing.

Then, are we at liberty to presume that Ferguson acknowledged his signature in the presence of William McKeen, when the witnesses depose that he said or did nothing which would amount to such an acknowledgment. Are there any circumstances to justify the Court in coming to the conclusion that the witnesses are mistaken in the account which they gave of what took place, or that they have intentionally misstated the facts? In the case of *Ilott v. Genge*, before referred to, when the question was whether the will was signed in the presence of the witnesses, Sir Herbert Jenner Fust says:—

"It is said that the Court may presume that the paper was signed while the witnesses were in the room; but the Court cannot presume this, while the impression on the minds of the witnesses is, that it was not signed in their presence. Although the circumstances of the case do not preclude the possibility of the paper having been then signed by the deceased in the presence of the witnesses, the proof of the

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¹ 13 S. & Tr. 200.² L. R. 3 P. & D. 172.³ 3 Curt 54.⁴ 13 S. & T. 200.⁵ L. R. 2 P. & D. 1.⁶ L. R. 1 P. D. 70.

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affirmative lies on those who propound the paper, and I cannot presume, in the absence of all evidence—notwithstanding I have a strong inclination to carry into effect the clear intentions of the deceased—that the instrument was signed in the presence of the witnesses.”

I adopt this language, as very applicable to the present case, and though I, too, may have a strong belief that Ferguson intended to execute the will according to law, and believed that he had done so, I have no right to presume—not only in the absence of all affirmative evidence, but contrary to the belief of the witness—that he acknowledged his signature to William McKeen.

No doubt, where there is a perfect attestation clause, the presumption is, *omnia rite esse acta*, in favor of the due execution of the will; and even where the attestation clause is not strictly regular, the same presumption may apply to some extent. If the witnesses were entirely forgetful of the facts attending their signing, the law would presume that the will was duly executed; but if they professed to remember the transaction, and state that the testator did not make or acknowledge his signature in their presence, and this negative evidence is not rebutted by proof of circumstances shewing that the witnesses are not to be believed, or that from the facts which they state, their recollection fails them; then it cannot be presumed that the will was duly executed: *Burgoyne v. Shouler*.¹ I can find no circumstances in the evidence which would justify me in saying that the witness William McKeen is not to be believed, or that his recollection has failed him as to what took place; and Charles McKeen swears positively that Ferguson did not sign or acknowledge his signature in his, and his brother's presence.

In all the cases which I have met with, where wills have been held to be duly executed, notwithstanding negative testimony, there have been peculiar circumstances, which, in the opinion of the Court, warranted the conclusion that one, or both the witnesses were mistaken. Thus, in *Cooper v. Bockett*,² where the contention was, that the testator had signed the will after the witnesses had subscribed their names; both the witnesses (who were the testator's servants) deposed that after they had signed, the testator wrote something on his will: one

¹ 18 Jur. 814; 1 Rob. 5.

² 24 Moo. P. C. 419.

of them said he believed it was his (the testator's) name; that he did not see all he wrote, but saw him write the large "R," the initial letter of his christian name—the signature was "R. H. S. Cooper"—and then said, "This is my name in your presence." The other witness deposed that she did not see what the testator wrote, but supposed it was his name; that she could not say that his name was signed to the will when she signed it, but as well as she could remember, it was all blank where his signature appeared on the will after his death. The Court held that the testimony of the female witness did not prove that the signature of the witnesses preceded that of the testator; that it was consistent with her testimony, that what she had seen him write was either the words "Witnesses to the said will," which were written within a bracket to the left of the witnesses' signatures, or "9 Pall Mall, East—Servants at house," (which were written underneath his own signature), and not his name. But with regard to the other witness, it was admitted that his evidence created a difficulty in the case. It was held however, from what appeared on the face of the will, and from the improbability that an educated man calling upon persons to witness his will, should have allowed them to sign their names before he had signed, that the witness must be mistaken as to the order in which the signatures were made.

In *Lloyd v. Roberts*,¹ the will was in the handwriting of the testator, an attorney, and was without break or crowding, with a formal attestation clause, and attested by two witnesses. One of the witnesses was dead, the other deposed that when he signed the will, the paper was blank, with the exception of the testator's signature, and the signature of the other witness. It was held, from the appearance of the will, as well as from the circumstance that the testator was a professional man, well acquainted with the necessity of a proper execution, and the presumption of law that the will was written when it was attested, that the witness must be mistaken as to its being a blank when he signed it; and therefore that it was duly executed.

In *Wright v. Rogers*² the will had a full attestation clause, and was signed in the presence of the witnesses, an attorney

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¹ 12 Mo. P. C. 158.² L. R. 1 P. & D. 678.

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and his clerk. After the death of the testator, an affidavit was required as to certain interlineations which appeared on the face of the will, and such affidavit was prepared by the clerk, and sworn to by the attorney, stating the due execution of the will, and that it had been subscribed by the witnesses in the testator's presence. Upon this the will was proved, and afterwards the attorney died. After his death, the clerk made a statement that the will was not subscribed by the witnesses in the presence of the testator; but the court held that, under the circumstances, the testimony of the surviving witness was not to be relied on, and that the will was duly executed.

In *Cregreen v. Willoughby*¹ the attesting witnesses contradicted each other on the point that the deceased signed his name in their joint presence; and the court held that the evidence of the witness who affirmed the due execution was *more reliable than that of the other witness*.

In *Myers v. Gibson*² the attorney who drew the will, and was present at its execution, swore to the due execution, in opposition to the evidence of the persons whose names appeared as subscribing witnesses, who swore that their names were forgeries. There was also other evidence of the genuineness of their signatures.

In *Bailey v. Frowan*³ the note of the case states that the witnesses denied having attested the will in the presence of the testator; but as their evidence appeared to be of a doubtful character, and the surrounding circumstances, and the appearance of the paper were in favor of its having been duly attested, the court acted upon the presumption *omnia rite esse acta*, and pronounced for the will.

These two cases cited from the Weekly Reporter, do not appear to be reported elsewhere, and the statement of them is taken from the digest. The facts in *Bailey v. Frowan* are stated so generally, that it is not of much value as an authority.

Whether the testator in the present case acknowledged his signature in the presence of both the witnesses, is a question of fact. I think there is negative evidence on this point by both the witnesses, and I am unable to discover any circumstances in the case which would justify me in coming to the

¹6 Jur. N. S. 590.²14 W. R. 901.³19 W. R. 511.

conclusion that their testimony is not to be relied on, or that there is anything improbable in the account they have given, or, that their memories have failed them. The paper was signed on the 30th April, 1879, and they gave their evidence respecting it on the 18th February following, so that the circumstances may be presumed to have been comparatively fresh in their memories.

There is nothing in the attestation clause to indicate that Ferguson knew that signing was essential to the execution of a will; indeed, the words which he has used—"sealed and delivered"—would rather shew that he was ignorant of the necessary formalities of a due execution. But even had the attestation clause been quite formal, I cannot think that the fact of a testator having written that he had signed the will in the presence of the witnesses, would be anything more than presumptive evidence in the absence of negative evidence that he had done so; or, that he would be chargeable with making the witnesses attest to a falsehood, if in fact the will was not signed or acknowledged in their presence.

Admitting that the paper was signed by Ferguson before the witnesses subscribed, the question still remains, whether there was any acknowledgment of his signature in presence of both the witnesses? And, I think there was not.

The conclusion I have arrived at on this point, renders it unnecessary to consider the other question—whether the witnesses subscribed in the presence of each other.

I think the appeal should be dismissed, and that the costs of both parties should be paid out of the estate.

Appeal dismissed, costs of both parties to be paid out the estate.

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MARSHALL v. ARMSTRONG, ET AL., ADMINISTRATORS, ETC.

[2nd Division, before WELDON, FISHER,* and WETMORE, JJ.]

Executor—Claim against estate—Need not be sworn to before action—
Consol. Stat., cap. 52, sec. 19—Probable expenses of administra-
tion—Right to retain for.



By Consol. Stat., cap. 52, sec. 19, it is provided that no debt shall be paid by an executor until the same be certified by affidavit.

Held, that the obtaining of the affidavit was not a condition precedent to the right to sue for the debt, and if it were, to be available as a defence, it would have to be specially pleaded.

The defendants, under the item "expenses of administration", in the notice given with the plea of *plene administravit*, under Consol. Stat. cap. 52, sec. 21, offered evidence of the probable expenses of this and other suits.

Held, that the evidence was properly refused.

Assumpsit for work and labor for the intestate, tried before Weldon, J., at the Carleton Circuit in May, 1880.

A verdict was found for the plaintiff for \$134.

The facts material to the points decided will be found in the judgments.

October 20. *Geo. F. Gregory* moved, pursuant to leave reserved, for a nonsuit, or for a new trial. There was no affidavit of the debt as required by section 19 of cap. 52 of the Consol. Stats., delivered to the administrator. This I claim is a condition precedent to the plaintiff's right of action. [WETMORE, J. Assuming you are right, would you not have to plead it?] I think not. I put it on the same footing as notices to Justices, which need not be pleaded. [WETMORE, J. The statute expressly provides for that.]

We should have been allowed to shew that we retained a portion of the estate to meet the probable expenses of this and other suits pending, and of closing up the estate: *Ros. Evid.* 1202 (13 ed.), *Gillies v. Smither*,¹ Consol. Stat., cap. 52, sec. 21.

Under the ruling of His Honor the administrator would have been obliged to close up the estate at once and pay the costs of this suit out of his own pocket.

E. L. Wetmore, shewed cause. The point that the claim has not been certified by affidavit is not open to the defendants on

*His Honor Mr. Justice Fisher, who heard the argument in this case, died before judgment was delivered.

(2) The points upon which the court gave judgment and the arguments of counsel on those points in the case of *McBride v. Woodworth, Administrator, etc.*, were the same as in the case of *Marshall v. Armstrong, et al., Administrators, etc.*, and it was therefore not considered necessary to print the arguments and judgment in *McBride v. Woodworth*.—*Rep.*

¹ 2 Stark. 583.

the pleadings, but if it were, there is nothing in it. The proviso at the end of section 19 of cap. 52 is only to protect the estate against the payment of unfounded claims by the executor. While the executor could not get an item passed in probate which had not been certified by affidavit, it was never intended that the obtaining this affidavit was to be a condition precedent to a person's proceeding in the ordinary tribunals for the recovery of a claim which the personal representative refused to pay.

It is not a condition precedent to the plaintiff's right, for the right existed before the death of the intestate, and continued after it.

The defendants attempted to shew that they retained money to pay anticipated expenses in winding up the administration, and not expenses for which they had actually made themselves liable, and therefore *Gillies v. Smither* does not apply.

Cur. adv. vult.

The following judgments were now delivered:

WELDON, J. This was an action of assumpsit for work and labor, tried before me at the Carleton Circuit in May, 1880. A verdict was found for the plaintiff on the first and third issues for \$134, which I, with consent of counsel, apportioned and directed \$64 to be entered on the second issue, and \$68 upon judgment *quando acciderint*. The issues were—1. Non-assumpsit: 2. Discharge and satisfaction: 3. Set-off: and 4. Fully administered. Also notice under section 21 of chapter 52 Consol. Stat., of outstanding debts.

The defendants claim a new trial upon the ground that I ruled against the defendants' right to retain \$400 for expenses which they might incur in this and other suits against them, and in winding up the affairs of the estate; and on the ground that the plaintiff cannot maintain this action under the 19th section of chapter 52 of the Consol. Stat., which states that no debt shall be paid by the executor until the same be certified by affidavit. As to the non-allowance of the sum for meeting costs which might be incurred in this and other suits and in winding up of the estate, the 35th section of chapter 52, states, "the Judge shall tax the costs in all matters before him and order the payment out of the estate or otherwise, as he

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may direct." The 28th section gives authority to the Judge to allow the executor a reasonable commission not exceeding five per cent. The 21st section describes what notice shall be given of debts unpaid. Chapter 52 nowhere provides for any retention of money of the estate to meet expenses which may arise, and no authority was cited for such a position, and in the absence of any statutory provision for that purpose, I am of opinion it cannot be allowed on the plea of *plene administravit*, nor can it be authorized by the 21st section, which specifies what the pleadings and notice shall contain. The executors can only retain what the Act of Assembly authorizes them to retain, and the probable costs to be incurred are not within the Act.

As to the second ground—If the defendants claim to defend the action upon the ground that the debt had not been certified by affidavit, should they not have pleaded it as provided for by the 20th section of chapter 52, and so have placed the onus of proving it upon the plaintiff. I am of opinion that if it was necessary to have the debt certified by affidavit, that defence should have been raised by the pleadings. It cannot be that the paragraph at the close of the 19th section can take from the Court their common law jurisdiction over claims of creditors against an estate.

It was urged by the counsel for the defendants that in actions against Justices a notice was required to be proved—that is required in express terms by the acts for the protection of Justices and other officers. But what is there in the Probate Act which requires a plaintiff to give the executor or administrator notice of his demand, or prove his claim by affidavit before he can bring an action? If the executor is not sufficiently informed in regard to any action brought against him, the 22nd section of the Probate Act provides that on application to the Court or a Judge he may obtain time to enable him to plead. And if he is ready and willing to pay the plaintiff's claim, if certified by affidavit, he could obtain an order to stay proceedings in the suit until that was done: but when he does not do so, but denies the whole claim, or sets up that he has a set-off against it, or that it is discharged by payment, or on any ground claims to defeat the action of the plaintiff, the defence has

to be made out to the satisfaction of the court and jury. Upon this ground I am of opinion the objection that the claim has not been certified by affidavit, can not arise, and the verdict should not be disturbed. The 19th section of the Probate Act appears to be directory as to the duty of the executor, and does not interfere in the slightest degree with the jurisdiction of this court.

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WETMORE, J. Declaration for money payable by defendant as administrators for work and labor, etc., performed for intestate in his lifetime.

Pleas: 1st. Never indebted: 2nd. That before action brought and in intestate's lifetime said intestate satisfied and discharged by payment plaintiff's claim: 3rd. Set-off, for goods sold and delivered—work and labor—money lent—money paid, etc.—account stated: 4th. *Plene administraverunt* all the personal estate and effects which were of intestate which had come to defendants' hands as administrators, etc., to be administered, and defendants had not at the commencement of this suit, nor have they since had, any personal estate or effects of the intestate, to be administered.

With notice under Consol. Stat., sec. 21, cap. 52, of other debts, which after specifying a number of debts or alleged claims against the estate contains the following "expenses of administration, \$400."

The plaintiff joined issue on all defendants' pleas.

It appears there was some arrangement on the trial in reference to amounts and the mode of entering the verdict which must be regulated entirely by the learned Judge who tried the cause, and he seems to be satisfied with the finding of the jury.

The defendant claims to have a non-suit entered or new trial granted, on the ground that the proviso at the end of sec. 19, of cap. 52, which is as follows: "And further provided, that no debt shall be paid by the executor until the same shall be certified by affidavit," had not been complied with. A motion for nonsuit was made and refused on the trial, and the learned Judge was of opinion that such a matter of defence if available, must be set up by plea. The section, with the exception of the above proviso, and another one saving the effect of any lien or other security which a creditor may hold for payment

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of his debt, is confined to directions as to the payment of debts of the deceased, according to their legal priority in classes, and defining such priority. By section 24, the executor shall render an account of his administration, and upon such account the Judge of Probate is to pronounce. I can quite understand that before the executor can succeed in having the payment of any debt allowed by the Judge of Probate, such debt must be certified by affidavit. This affidavit is one to be rendered to the executor—it is not an affidavit in any court or in any suit, it is such a one as is contemplated by section 28 of cap. 118 Consol. Stat., entitled Interpretation of terms, explanations and general provisions—where it provides that a Justice of the Peace may administer an oath relating to inventories or *accounts rendered to the executors of an estate*. The provision would apply where no dispute exists as to the debt, but I think it will not apply where the whole debt is disputed. When the amount is admitted no difficulty can arise in this respect. Still the executor requires the affidavit to enable him to get the item passed by the Judge of Probate, but where the whole amount is disputed by the executor it may be very inconvenient, indeed, almost if not quite impossible, for the creditor to make the necessary affidavit or procure the same to be made. Is he therefore to be denied the privilege of having his claim submitted to the consideration of a jury upon such evidence as may be entirely satisfactory to the court and jury, because he may be unable to furnish the affidavit in the first instance? If the claim is contested before a court and jury and established by a judgment, I think the judgment will be satisfactory as to the amount; and I think a creditor has the right so to establish his claim, notwithstanding the proviso. If the creditor of an estate could not provide the necessary affidavit, it would be rather hard on him that he should be shut out from establishing his claim in the ordinary tribunals of the country, whatever affidavit he might require after his claim was established, in order to get his established claim paid. Establishing the claim by the creditor is one thing; the executor paying it is quite another. And while the creditor may be entitled to establish his claim without an affidavit in the first instance, it may be the executor is not to pay it until it is certified by affidavit, after being established.

I am unable to bring my mind to the conclusion that a creditor is barred from instituting proceedings for his claim before its being certified by affidavit. But suppose I am wrong in my view, how can the defendants avail themselves of the objection without pleading it. The Statute of Limitations must be pleaded: 2 Saunderson's Rep. 63 d. (*n.*); *Quantock v. England*.¹ Per Lord Mansfield:—"It is settled that the Statute of Limitations does not destroy the debt: it only takes away the remedy. The debtor may either take advantage of the Statute of Limitations, if the debt be older than the time limited for bringing the action; or he may waive this advantage." So this proviso does not destroy the debt; it merely says no debt shall be paid by the executor until the same be certified by affidavit.

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If the non making of the affidavit before action is available as a defence, it would seem by analogy to the statute of limitations, that it can only be taken advantage of by plea. The proviso does not require the affidavit to be made before action; it merely says, no debt shall be paid until the same be certified by affidavit. The defendants' position was sought to be assimilated to a suit against a Justice of the Peace, as regards the notice of action—which need not be pleaded, and for the best of reasons. Sec. 8 of cap. 90 Consol. Stat., requires the notice to be given, and sec. 10 provides—"If on the trial of any action the plaintiff shall not prove the action brought, notice thereof given within the time limited in that behalf, the cause of action stated in the notice and that it arose in the County where brought, he shall be nonsuited or the verdict may be for the defendant." Without the provisions of sec. 10, could the defendants have availed themselves of the protection of sec. 8, without plea? I think not. Had the proviso referred to enacted that such an affidavit should be made before a suit commenced, and that unless the plaintiff proved it was so made on the trial, then he should be nonsuited, the cases would be more in accord.

The matter of a builder obtaining a certificate from a particular architect before he is entitled to recover was also urged, but in such a case the plaintiff would not have any right of action

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until such certificate was first procured. There would be no indebtedness before the certificate. In the present case the plaintiff had a perfectly good claim—so found at least. The defendants go into court to contest the claim. They say nothing about an affidavit. If they sought to avail themselves of such a defence they should have done so by plea. Without a plea, I think they were in the same position as if they endeavoured to set up the defence of the statute of limitations, without plea.

As to the defendants' right to retain an amount to cover the expenses of law suits,—while I find by sec. 22 of cap. 52, that time may be granted to an executor in an action brought against him if it appears to the Court, or a Judge thereof, that he requires further information respecting the estate to enable him to plead, I cannot find anything in the act to authorize the executor of his own mere motion to retain a sum of money, the amount to be fixed by his own discretion, for the purpose of being used in indemnifying him against any probable costs that may be incurred. If he can it would scarcely be available under the plea of *plene administravit*. The notice under section 21 is that there are debts of a prior class unsatisfied, or that there are debts unpaid of the same class as that on which the suit is brought. This would scarcely extend to money retained by the executor to meet probable costs in suits, that might or might not arise, or be incurred. The plea should be *plene adm't. præter*.

A plea setting forth retention of such sum as the discretion of the executor might suggest, to meet probable costs that might be incurred, would certainly be quite a novelty in its way. Still, without it, I think the retention of the money could not be justified, however such a plea itself might fare.

I do not see any sufficient ground for disturbing the verdict by reason of that reception or rejection of evidence. The arrangement of the verdict having been settled by the learned Judge in pursuance of the agreement of counsel, I see no reason why the defendants should succeed in their motion.

Rule refused.

WOOD v. MACKEY AND WIFE.

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[2nd Division, before WELDON, FISHER,¹ and WETMORE, JJ.]*April.*

Slander—Husband and wife—Action for words of wife—What witness understood words to mean—Evidence—Damages.

In an action of slander a witness cannot be asked what he understood to have been meant by the words used ; unless it is first shewn that there was something to prevent the words from conveying the meaning they would ordinarily convey. Per WELDON and WETMORE, JJ.

In any case the question would be improper if asked the plaintiff, for if the words used required a peculiar meaning to be given them to make them actionable, others than the plaintiff must have understood them to have been used in the peculiar sense, or there would be no publication. Per WETMORE, J.

In an action of slander against a husband and wife for the slander of the wife, evidence of a statement of the wife made subsequent to the slander, that her husband compelled her to utter it, and his object in compelling her, is improper. Per WELDON, J.

Slander tried before Wetmore, J., at the York *Nisi Prius* Sittings in August last. Verdict for the plaintiff for \$250. The facts are fully stated in the judgments of the Court.

October 29th, 1880. *E. L. Wetmore*, for a new trial. The evidence of Wood as to what he understood the female defendant to mean by the words used was improper. The words were not ambiguous, and evidence of what the plaintiff understood they were meant to convey should not have been received. At all events the question would be improper unless a foundation was first laid by shewing that the words were not used in their ordinary sense. It is by no means certain that without the evidence of the plaintiff as to what he understood the defendant meant by the words, the jury would have found she meant to charge him with adultery. *Daines v. Hartley*.²

The action having been brought for the slander of the wife, her statements made after the uttering of the slander, that her husband forced her to utter it, and of his object in doing so was also improper. It would not be evidence in aggravation of the damages against the wife, the real defendant, for it would tend to excuse her. It is true it would probably have the effect of increasing the damages if the jury believed it, but then the slander would have been the husband's, and the wife should not have been joined.

Mrs. Mackey could not have been put upon the stand to

¹Mr. Justice Fisher was present at the argument, but died before judgment.

²8 Exch. 200.

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The words used could only mean that the plaintiff had had connection with Mrs. Mackey and was therefore guilty of adultery. Any evidence therefore of what the plaintiff understood them to mean would be immaterial and could not possibly affect the issue. Where this is the case the Court will not order a new trial: *McKenzie v. Scovil*; ¹ *Carter v. Saunders*.²

If the Court should have any doubt on this point it is clear that the evidence of what had taken place before, between Mackey and the plaintiff, laid a foundation for the question and it was proper: *Broome v. Gosden*.³

Mrs. Mackey is the real defendant, but we are obliged to join her husband; is it, then, not idle to argue that we are precluded from giving evidence of malice in publishing the slander, in aggravation of the damages.

Wetmore, in reply.

Cur. adv. vult.

The following judgments were now delivered:

WELDON, J. This was an action for slanderous words spoken by the female defendant of the plaintiff, tried by Mr. Justice Wetmore at the York Sittings in August last. The pleas were, not guilty and insanity of the wife, when uttering the words charged. Verdict for the plaintiff, \$250. There were several grounds upon which the defendant moved for a new trial. It will only be necessary to refer to those which the Court think fatal to the plaintiff's sustaining the verdict.

1. In the questions put by the plaintiff's counsel "What did you understand her to be accusing you of?" Ans. "I understood her to be accusing me of having connection with her." "What offence?" Ans. "An offence of adultery." This occurred on the 5th August 1879.

2. Some two or three weeks after this, the female defendant came to Taylor's workshop where plaintiff was, and said to plaintiff—"All I ask of you is to forgive me." She said she had to say everything, no matter what it was, they threatened her with her life if she did not. She said, my arm is black

¹2 Han. 6.

²6 All. 147.

³1 C. B. 728.

and blue where Mackey struck me at the dinner table. She said she was put up to say the very worst she could by John Mackey, and then she mentioned the Mackeys. Ques. "Did she tell you their object?" (The Judge thought this was inadmissible.) Ans. "She said she was put up to it; they were all around her; the object was to hoist me out of the business. I had no talk with her, I was sitting there saying nothing. She moved around to where I was sitting and said—'All I ask of you, Wood, is to forgive me.'"

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As to the first question, the plaintiff's counsel contended the question was proper, to explain what the words meant, and cited *Broome v. Gosden*.¹ But I think that case does not sustain that contention. In *Hankinson v. Bilby*,² Chief Baron Pollock says—

"Words uttered must be construed in the sense which hearers of common and reasonable understanding would ascribe to them, even though particular individuals better informed on the matter alluded to might form a different judgment on the subject."

The question could not be put unless a foundation was laid to render such a question necessary. The rule is laid down in *Daines v. Hartley*³ by Chief Baron Pollock thus. In an action for slander of the plaintiff, a witness stated, that the defendant said in regard to the plaintiffs, "You must look out sharp that those bills are met by them." The counsel for the plaintiff then proposed to put this question to the witness: "What did you understand by that?" The question was objected to, and the Lord Chief Baron was of opinion that it could not be put in that shape, and rejected it. A verdict passed for the defendant. A motion for a new trial was made on the ground of the improper rejection of this question. The case was fully argued and the rejection sustained. The Court, in giving judgment said—

"The proper course for a counsel to get at the meaning is not by asking, 'What did you understand by those words?' but, 'Was there anything to prevent those words from conveying the meaning which ordinarily they would convey?' because, if there was, evidence of that may be given; and then the question may be put. When you have laid the foundation for it, the question then may be put, 'What did you understand by them?' when it appears that something occurred by which the witness understood the words in a sense different from their

¹ 1 C. B. 728.² 16 M. & W. 444.³ 3 Exch. 200.

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ordinary meaning. I believe we may say, that generally no question ought to be put in such a form as possibly to lead to an illegal answer. Now taken by itself, and without more, the understanding of a person who hears an expression is not the legal mode by which it is to be explained."

This case is quoted, in *Burnet v. Allen*,¹ by Martin, B., with approbation, and also with approbation, by the Privy Council, in giving judgment in *Simmons v. Mitchell*.²

I think this case shews very conclusively that the question was one that should not have been put to the plaintiff. The declaration stated the words used, and there were alleged therein as the innuendoes for the jury to decide, if the words bore the meaning, or conveyed the meaning which the declaration alleged.

As to the other ground. The statement of Louise Mackey, the wife, in the shop of John Taylor, in presence of the plaintiff. The plaintiff's counsel contended that it was admissible: the action was in tort: the defendants were wrong-doers, and the wife's statement was evidence against her husband, who compelled her to make the charge against the plaintiff on the 5th August which she did, and the object which her husband had in view to compel her to make such disclosure. I think the husband and wife cannot be considered as joint tort-feasors; the relation is different; the communications between husband and wife cannot be disclosed to the prejudice of each other. The Con. Statutes, cap. 46, of witnesses and evidence, while it allows parties in a suit to be witnesses, distinctly declares that no wife shall be compellable to disclose any communication made to her by her husband during the marriage. So that she could not be a witness for that purpose, neither could her statement be evidence,—and even if the act did not exclude her testimony, it would be excluded from motives of policy. Starkie on Evidence, vol 1, p. 69, thus lays down the rule:—

"There are some instances where the law excludes particular evidence, not because in its own nature it is suspicious or doubtful, but on grounds of public policy, and because greater mischief and inconvenience would result from the reception than from the exclusion of such evidence; on this account it is a general rule that the husband and wife cannot give evidence to affect each other in a civil cause. For to admit such evidence would occasion domestic dissensions and

¹ 4 Jur. N. S. 488.

² 50 L. J. Privy Council Cases.

discord ; it would compel a violation of that confidence which ought from the nature of the relation to be regarded as sacred ; and it would be arming each of the parties with the means of offence which might be used for very dangerous purposes."

This rule does not extend to criminal charges, founded on violence offered to the wife.

Upon these two points, which are clearly against the rules of evidence, and are a violation of important principles, I think the rule must be made absolute for a new trial.

WERMORE, J. The declaration alleges that the defendant, John Mackey, having stated to plaintiff that he, plaintiff was accused by defendant, Louise Mackey, wife of John Mackey, of having had sexual intercourse with her since her marriage to defendant, John Mackey, and that she had taken down the days and dates when the said criminal connection had taken place, and plaintiff having denied the truth of said charge, and declared his readiness and willingness to repeat his denial thereof in the presence of both defendants; and defendant John Mackey having requested plaintiff so to do, the plaintiff at defendant John Mackey's request went to his dwelling house, where both defendants and divers other persons were, and she, the said Louise Mackey, being asked by defendant John Mackey to make a statement with reference to her said accusation against him, thereupon falsely and maliciously spoke and published in the presence of divers and sundry persons, of and concerning the plaintiff and of and concerning the matter of the said accusation so as aforesaid made by her against plaintiff, the words following: "*I,*" meaning defendant, Louise Mackey, "*hauled Woods,*" meaning plaintiff, "*on, but I did not take out his privates,*" meaning thereby that the plaintiff had committed the crime of adultery with the said Louise Mackey, she being a married woman, by having at the solicitation of said Louise Mackey had carnal knowledge of her person, and upon the defendant, John Mackey, putting the Holy Bible beside her and saying "*this will prove it,*" the defendant, Louise Mackey, put her hands upon it, and turning to plaintiff and in presence of plaintiff and divers other persons as aforesaid, said, "*you,*" meaning plaintiff, "*did damn you,*" meaning that the plaintiff had in fact committed adultery with her, and in answer to a question put to her by the defendant, John Mackey, as to

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Wood her, she answered "*about six times*," meaning that plaintiff had
v. at six different times had criminal intercourse with her, and had
Mackey. been guilty of the crime of adultery with her, and the defendant
Louise Mackey, being asked by John Mackey, "where did all
this take place?" (meaning where did the alleged criminal
intercourse between defendant, Louise Mackey and plaintiff
take place), she replied "everywhere" meaning thereby that
plaintiff had been guilty of adultery with her, at various places.

The plaintiff testified that on the morning of the uttering of the alleged slander, John Mackey, in the store occupied by himself and plaintiff, said to plaintiff, "Mrs. Mackey makes some pretty serious charges against you; she accuses you of running her right straight along; that each time you had connection with her," (here follows a statement too disgusting to state, and for the purposes of my judgment, it is unnecessary it should be stated.) That plaintiff said to John Mackey it was "a put up job with his crowd to get him out of the business." (It appeared that plaintiff and John Mackey were jointly concerned in a general grocery business.) John Mackey replied, "It is just this, she has got it down, day and date, and if you just own up we will let the whole thing drop; this thing must be kept quiet." John Mackey, looking towards his father and speaking, as plaintiff supposed, to him, said "*it is a clear case of adultery*." His father, touching plaintiff on the shoulder, and accompanying the act with an oath, said, "*it is the penitentiary*." Plaintiff asserted his innocence and at John Mackey's request said he would go to his house and clear himself. Going out of the shop John Mackey again said to his father "*it is a clear case of adultery*." Plaintiff then went to one John Taylor's, a place which is close to John Mackey's residence, and in a few minutes plaintiff, at John Mackey's request, went into Mackey's house, and John Taylor at plaintiff's request accompanied them. Mackey's father and mother were in the room. A few minutes after his wife came in and John Mackey said, "here is my wife, let her tell her own story," She sat down and said to plaintiff, "you told my husband I was crazy." Plaintiff denied this, and she then stated, "*by G-d, I hauled Woods on, but I never took out his privates*." This plaintiff also denied. The plaintiff was

then asked, "What did you understand her to be accusing you of by the use of these words?" And—subject to objection—answered, "I understood her to accuse me of having connection with her." He was then asked of what offence? And—subject to objection—answered, "offence of adultery." Mackey, at his house, said "this will prove it," throwing a bible beside her, she putting her hand on or very close to the bible said, "you did, G-d d—m you, you are a"—(accompanied with an oath) "New York black-leg." John Mackey said to her, "*how many times?*"—(Not how many times the plaintiff had criminal intercourse with her, as stated in the declaration.) She replied, "*about six!*" John Mackey asked where all this took place, and she replied, "*oh, everywhere!*" Plaintiff stated, subject to objection, that "about three weeks afterwards he was in John Taylor's store, Taylor was present and Mrs. Mackey came in, and said to plaintiff, "all I ask of you is to forgive me." She said she had to say anything no matter what it was, because they threatened her with her life if she did not. That her arm was black and blue where Mackey struck her at the dinner table. Referring to the alleged slander, she said she was put up to say the very worst she could, by John Mackey and his crowd, mentioning the Mackeys. He was then asked, "did she tell you the object?" and—subject to objection—said, "she said she was put up to it, they were all around her; the object was to hoist me out of the business; and then again she said, all I ask of you Wood, is to forgive me."

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John Taylor was also called as witness for plaintiff, and gave substantially the same evidence. In addition he said, "just before Mackey threw the bible towards his wife, he (Mackey) said '*this is a clear case of adultery*, and this will prove it,' taking a bible and throwing it down on the sofa."

As to the right of the plaintiff to give evidence of what he understood Mrs. Mackey to mean by the words "I hauled Woods on, but I never took out his privates." In *Daines v. Hartley*,¹ it was held, in an action for words spoken or written, the ordinary sense of these words is to be taken as the meaning of the speaker or writer, unless something be shewn to have taken place which may give a peculiar character to the

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expressions used : in the absence of any such evidence a witness cannot be asked the question, "What did you understand by the words?" The proper course to be adopted is first to lay the foundation by giving such evidence, and then the question becomes admissible. Pollock, C. B., in delivering judgment, at page 205 says:—

"We are of opinion that the question could not be so put. There can be no doubt that words may be explained by bystanders to import something very different from their obvious meaning. The bystanders may perceive that what is uttered, is uttered in an ironical sense, and therefore that it may mean directly the reverse of what it professes to mean. Something may have previously passed which gives a peculiar character and meaning to some expression; and some word which ordinarily or popularly is used in one sense, may, from something that has gone before, be restricted and confined to a particular sense, or may mean something different from that which it ordinarily and usually does mean. But the proper course for a counsel who proposes so to get rid of the plain and obvious meaning of words imputed to a defendant as spoken of the plaintiff, is to ask the witness—not 'What did you understand by those words,' but 'Was there anything to prevent those words from conveying the meaning which, ordinarily, they would convey?' because if there was, evidence of that may be given, and then the question may be put. When you have laid the foundation for it, the question then may be put 'What did you understand by them?' when it appears that something occurred by which the witness understood the words in a sense different from their ordinary meaning. I believe we may say that, generally no question ought to be put in such a form as possibly to lead to an illegal answer. Now, taken by itself and without more, the understanding of a person who hears an expression is not the legal mode by which it is to be explained. If words are uttered or printed, the ordinary sense of those words is to be taken to be the meaning of the speaker; but no doubt a foundation may be laid by shewing something else which has occurred; some other matter may be introduced and then, when that has been done, the witness may be asked, with reference to that other matter, what was the sense in which he understood the words. But the mere question, 'What did you understand with reference to such an expression?' we think is not the correct mode of putting the question."

In Starkie's Evidence, vol. 2, page 628, quoting at page 203 *Daines v. Hurtley*, it is laid down that—

"The truth of an innuendo is a question of fact for the jury," (see also *Broome v. Gosden*,¹) "and in general if the meaning of the terms be ambiguous it is for the jury to say in what sense they were used. Thus, if the defendant call the plaintiff a thief and it be doubtful, under the circumstances, whether the term was meant to be applied in its felonious sense, it is for the jury to decide."

In the argument of counsel, at page 204, it is admitted that the sense which the words may convey is a question for the jury, but the jury ought to have the requisite materials before them by which to arrive at the proper conclusion.

Then was there any foundation laid to warrant the question as to what the plaintiff understood her to be accusing him of?

The action is brought against the wife for slander, not against the husband for anything he said. He is joined in the action because the law requires he should be, inasmuch as the wife cannot be sued alone. The plaintiff cannot in the same action proceed also for slander, assault, or other tort committed by the husband alone; nor can the husband and wife be sued jointly for slander by both: 1 Chit. Pld., 5 ed., 105.

While the statement as to the committing of adultery, made by John Mackey in the shop in presence of his father, and at the house in his wife's presence, might furnish a ground of action against him alone, I do not think it furnished such evidence of something that had previously passed, as to give such a peculiar character and meaning to the words used by Mrs. Mackey, as would justify the witness in stating what he understood Mrs. Mackey to be accusing him of, by the words used. It does not appear that Mrs. Mackey was informed of what took place between the plaintiff and John Mackay in the shop in presence of his father. The plaintiff says Mrs. Mackay came into the room and John Mackay said, "here is my wife, let her tell her own story." Nothing whatever appears to have been said at the house of what took place in the store. What took place in the store may have amounted to the use of actionable words, as the charge of adultery made by Mackey in the house may have amounted to the same, but these charges were made by Mackey, and not by his wife. But mixing the two together, in effect, would enable the plaintiff to recover against the husband and wife in a joint action, for their separate slanders. And further it seems to me that, if from what had taken place in the store or at the house, the objected question might have been put to any other witness, it could not properly be put to the plaintiff himself. What the plaintiff understood the words to mean, would not, I think, be admissible in evidence. If slanderous words are used by the defendant in the presence

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of the plaintiff alone, no one else hearing them, an action of slander could not be maintained. There must be a publication. The publication of a libellous letter to the plaintiff alone, though it may be the subject of an indictment, is not such a publication as will maintain an action: *Phillips v. Jansen*.¹ Starkie on Slander, (Ed. 1876), p. 27: Publication to a third person is necessary in order to sustain the action. So with reference to what was understood by the words in the present case. The maintaining of the suit depends upon what other persons understood them to mean, and not what the plaintiff himself understood them to mean. If words are used which require a particular meaning to make them actionable, and all the hearers understood them as conveying a meaning not actionable, except the plaintiff, I apprehend an action could not be maintained, as the words did not convey an actionable meaning to the hearers. There would, in such a case, be no publication of actionable words. The plaintiff, understanding them as conveying an actionable meaning, would not help him, as there would be no publication of words conveying an actionable meaning to other persons. The plaintiff alone so understanding them, would be no more a publication than the uttering of slanderous words to the plaintiff, which were not heard by any one else. In the one case he, only, would hear the words; in the other, he only, would understand them as conveying an actionable meaning: in either case there would be a lack of the publication of slanderous words required to maintain the action. If the words required a particular meaning to be proved, I think the plaintiff was not the proper person to prove such meaning. The right to maintain the action would depend upon what other persons understood the words to mean, and not what plaintiff understood by them. Upon both the views I have expressed, I think the evidence was improperly received.

It is said the meaning of the words is clear, therefore the evidence is immaterial. I am not at all positive that the clear meaning of the words is a charge of adultery. Whatever the disgusting and indecent expressions—and such the words used by Mrs. Mackey unquestionably were—charged the plaintiff with, the imputation may fall short of the crime of adultery.

It was for the jury to affix a meaning to the words, and without the plaintiff's evidence they might have concluded, however gross the indecency charged, that Mrs. Mackey did not mean to charge adultery.

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As a general rule the improper admission of evidence is a ground for a new trial; and the Court will set aside a verdict given for the party producing the evidence unless they are clearly satisfied that the improper evidence had no influence upon the jury: *Baron de Rutzen v. Farr*; ¹ *Key v. Thomson*; ² and *Wright v. Tatham*,³ cited in *Jackson v. McLellan*; ⁴ and it seems to me impossible to say what effect the plaintiff's evidence in this respect, had upon the minds of the jury. I am by no means prepared to say it had no effect. The rule in *Daines v. Hartley* must, I think, prevail, which is fatal to sustaining the present verdict.

Having made up my mind that the first ground is fatal to sustaining the verdict, I do not deem it necessary to express any opinion upon the other ground, which my learned brother Weldon has discussed. The rule for a new trial should, I think, be made absolute.

Rule absolute for a new trial.

DOE DEM. SEELY v. CHARLTON.

[2nd Division, before WELDON and WETMORE, JJ.]

1881.

April.

Infant—Conveyance of land by—Confirmation after coming of age—Evidence.

A conveyance of land by an infant is voidable only and may be avoided by him, after coming of age.

Mere omission to disaffirm such a deed is not sufficient evidence to warrant a jury in finding a confirmation.

Ejectment tried before Wetmore, J., at the Saint John Circuit in August, 1879. Verdict for the defendant. The material facts are very fully stated in the judgment of Mr. Justice Wetmore.

June 10th, 1880. *W. Pugsley*, moved for a new trial. His Honor told the jury that if £2 which McMackin said he paid Dr. Smith for Peter Seely, after the deed was given, were paid on account of the purchase money, that would be evidence of

¹ 4 A. & E. 53.

² 2 Han. 224.

³ 7 A. & E. 313.

⁴ 2 Pugs. 84.

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acquiescence. There was no evidence that Seely ever knew that he had made a deed to McMackin. [WETMORE, J. Did not McMackin swear he paid Seely the balance of purchase money? There is unquestionably sufficient evidence to sustain the finding of the jury as far as Peter Seely is concerned.] The only evidence of acquiescence on the part of the Duffys is their omission to disaffirm, this I contend is not sufficient under the rule laid down in *Doe dem. Foster v. Lee*;¹ *Doe dem. Hickman v. King*;² *Thompson v. Leach*;³ *Doe dem. Jackson v. Carpenter*.⁴

E. L. Wetmore, shewed cause. There is evidence of the payment of a part of the purchase money to Seely after his recovery. Surely this would be sufficient evidence to warrant the jury in coming to the conclusion he knew of the deed and acquiesced in it. [WELDON, J. We are satisfied that the finding was all right as far as Seely is concerned, so you need not dwell on that point.] Then I contend the Duffys are in the same box, for the deed from Ann Duffy acknowledges the receipt of the purchase money. This money was retained by her, and that amounts to a ratification. The point that the purchase money had been retained was not raised in *Doe dem. Foster v. Lee*.⁵

It is also important to bear in mind that if the rights of third parties have intervened since the giving of the deed, their title ought not to be disturbed unless the case is very clear. *Wright v. Vanderplank*.⁶

The devise to James Seely was only a charge upon the land, and the fee vested in all the children of Dominick Seely as tenants in common, and the plaintiffs are therefore barred by the Statute of Limitations.

Pugsley, in reply. The acknowledgment of the receipt of the purchase money in the deed of Ann Duffy was made during her infancy. There must be some act shewing an intention to ratify after full age.

Cur. adv. vult.

The following judgments were now delivered :

WETMORE, J. The plaintiffs claim as heirs of Dominick Seely, whose title may be assumed to have been proved.

¹ 2 Han. 486.
² 1 Han. 330.

³ 3 Mod. 296-310.
⁴ 11 Johns. 538.

⁵ 2 Han. 486.
⁶ 8 DoC. McN. & G. 132.

Dominick Seely left a will which is not dated, but appears to have been registered 26th October 1847, by which he devised the lot in question as follows:—"I give devise and bequeath unto my son, James Seely, of, &c., &c., all that certain lot, piece and parcel of land, situate in Lancaster, lying on Grand Bay," then follows its description. The will then states: "I give as above-mentioned to my son, James, an infant about the age of three years, he shall be maintained and clothed, with education, out of the benefits that shall arise from the above property until he becomes of age (twenty-one). Then the above property shall be divided between my children," (naming them). Among the children named are Peter Seely, and Ann, now Ann Duffy, one of the lessors. The property to be equally divided between them. This is the only part of the will I need refer to.

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On the trial I ruled that by this devise the fee would be vested in James until he attained twenty-one years of age, and on his attaining that age the right of each of the children would accrue, and their title would vest.

Peter Seely says his father died in 1847, and James was then three years old, so he would become twenty-one years of age in 1865, and then the title of the other children would accrue, according to my ruling.

Ann, one of the lessors, married Francis Duffy, another lessor.

The plaintiffs' *prima facie* case rested on evidence of a deed from William Hazen, administrator of Ward Chipman, to Dominick Seely, dated 4th April, 1820, acknowledged and registered 4th of April 1820, and possession taken under it, with proof of the will of Dominick Seely, his death, and the names of the children of Dominick, Peter Seely and Ann Duffy, being two of them.

The defence rested on deeds from all the heirs to Thomas McMackin, and from him by several conveyances to the defendant. This defence was sought to be met by the fact that Peter Seely was of unsound mind when he executed his deed, and therefore it was not binding on him, and that Ann Duffy was not of age when she executed the deed of her right.

Admitting, for the purpose of the argument, that Peter Seely was not of sufficiently sound mind to have executed the deed so as to convey his interest, and the jury have so found, still

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after the restoration of his mind he could acquiesce so as to render the deed valid. Evidence was given as to his acquiescence, and the jury found in answer to a question I put to them, that he did acquiesce in the deed after the restoration of his mental faculties. Under this evidence it is not likely the Court would have interfered with their finding. As to the other lessors, Francis Duffy and Ann Duffy, the jury have found that Ann was under twenty-one years of age when she executed the deed. This deed was dated 12th June 1850, registered 2nd March, 1852. They have also found that she acquiesced in the deed, after attaining the age of twenty-one years.

Doe d. Foster v. Lee,¹ decides that a conveyance of land by an infant is voidable only, and may be avoided by the infant after coming of age, or if not confirmed, by his heirs after his death. Mere omission to disaffirm such deed without any circumstances from which an intention to ratify it may be inferred, will not amount to a confirmation. Acts *in pais* may amount to a confirmation, but they should be distinct and unequivocal, and shew a clear intention to confirm.

It cannot be said that there was not evidence that Ann was under age when she executed the deed, sufficient to warrant the finding. The deed would therefore be voidable unless the lessors, Francis and Ann Duffy, have ratified or confirmed it. There may have been acts *in pais* tending to confirm, but under the case cited they should be distinct and unequivocal and shew a clear intention to confirm. Mere omission to disaffirm, without any circumstances from which an intention to ratify may be inferred will not answer. After carefully looking over the evidence, I fail to discover any acts *in pais* or circumstances done or enacted by Ann Duffy to shew acquiescence. So, under the case cited, I was wrong in leaving the acquiescence of Ann Duffy to the jury.

It was contended on the trial, on the motion for a nonsuit, that the right of James was only a charge on the estate, and that the fee vested in the children of Dominick Seely on his death, by the terms of the will, and that their title was barred by the Statute of Limitations.

Supposing the view I took on the trial to be wrong, and that the title of the children did vest in them at Dominick Seely's death—and I think this view is entitled to very serious consideration,—their title would have been good at the trial, unless proved to have been cut down by some superior title, for instance adverse possession: such a question would require to be properly disposed of: it was a question for the jury, subject to being met by the lessors of the plaintiff, by evidence and any saving clause in the statute. The cause was not so tried; it went to the jury entirely on the documentary title and acquiescence in the deeds; and I think I left the acquiescence of Ann Duffy to the jury, without there being such evidence of it as seems to be required by *Doe d. Foster v. Lee*, and therefore the rule *nisi* for a new trial should be made absolute.

WELDON, J. This was an action of ejectment tried before my brother Wetmore, at the August Circuit in Saint John, in 1879, and a verdict was found for the defendant.

There was evidence to shew title to the property in the ancestors of the plaintiffs' lessors, upon which no question arises.

The lessors of the plaintiff had made a conveyance of their right to the land which is the subject of this action. Seely, it was contended, was not in his right mind when he made the conveyance; he had been injured in a mill or boom, and was suffering much pain when he executed the deed: but his subsequent acts shewed that he recognized the making of the deed, after recovering his mental faculties, and various acts of acquiescence were proved; among others, the receiving the consideration money. I think the finding of the jury on this demise should not be disturbed.

The demise of Duffy stands upon a different ground. She was an infant when she made the deed, and soon after married. There were no acts of acquiescence shewn to estop her from claiming the property. I am of opinion there was not evidence to warrant the jury finding against the demise by her. The rule laid down in *Doe d. Foster v. Lee*, decided in this Court, will guide us. I think the rule should be made absolute for a new trial.

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Rule absolute.

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April.

[2nd Division, before WELDON, FISHER,¹ and WETMORE, JJ.]

Trover—Lien—Person entitled to hold goods for—Claiming to hold for other charges—Tender—Waiver—Conversion.

The defendants, merchants in St. John, instructed plaintiffs, commission merchants in New York, to purchase for them a quantity of corn and ship to St. John. On arrival in St. John, the corn was found to be heated and musty and defendants refused to receive it, and notified plaintiffs they held it subject to their order. Plaintiffs consented to assume the invoice and directed defendants to sell for them to best advantage. Defendants undertook to sell but were unable to find a purchaser and it remained on their hands for a long time. A dispute having arisen concerning it, plaintiffs demanded it, and defendants refused to give it up until various charges and expenses for which they claim a lien, and of which they had given plaintiffs a memorandum, were paid. The goods were not subject to a lien for some of the charges for which defendants claimed to hold.

Held, by WELDON, J., that the defendants having furnished plaintiffs with a memorandum of the items of the different charges for which they claimed a lien, there was no waiver of their lien for proper charges, and in the absence of a tender of those charges their refusal was no evidence of a conversion.

Held, by WETMORE, J., that defendants having claimed to hold for charges which were not a lien upon the property, their refusal to deliver until those charges were paid was a waiver of their lien for proper charges and dispensed with the necessity of a tender of them.

Trover for a quantity of corn, tried before Wetmore, J., at the Saint John Circuit, in August, 1879. Verdict for the plaintiffs for \$500. The facts are fully stated in the judgments.

February 11th, 1880. *Weldon, Q. C.*, moved for a new trial. There was no evidence of a conversion. It is true that if a person, having a lien on goods, refuses to deliver them upon demand and claims to hold them on some ground quite distinct from the lien, his refusal will be evidence of a conversion and the existence of the lien would be no answer to an action of trover. But where, as in the case at bar, a person claims to detain goods for various charges and he has a lien only in respect to some of them, he does not waive the lien which exists. The plaintiffs having had a memorandum of all the charges for which the defendants claimed to detain the property, it was their duty to tender those which were a lien upon it, and not having done so, defendants' refusal was no evidence of a conversion. Defendants cannot be said to have dispensed with the tender unless they have said in effect, it is of no use tendering the amount in respect of which we have a

¹ Mr. Justice Fisher died before Judgment was delivered.

lien, for we will not accept it unless they pay our whole claim. The authorities shew merely claiming to detain for too much, is not sufficient: *Scarfe v. Morgan*; ¹ *Owen v. Knight*; ² *Green v. Farmer*.³

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At the time of the demand, Judge Palmer had no authority to receive the corn; a subsequent ratification of his act will not make defendants' refusal evidence of a conversion.

There was no evidence to sustain the finding on the first count. The defendants were gratuitous bailees and plaintiffs, at most, are only entitled to nominal damages: *Notara v. Henderson*; ⁴ *Biggins v. Goode*; ⁵ *Knotts v. Curtis*.⁶

C. A. Palmer, shewed cause. Assuming that it was necessary, as has been contended, that to dispense with the necessity of a tender, defendants would have to state in effect, that they would not accept the amount which properly attached as a lien: still the verdict should stand, for there was evidence to that effect given in this case. One of the defendants, in his evidence, stated they meant to hold the goods until their whole claim was satisfied. But the authorities do not go to that extent: *Ayling v. Williams*; ⁷ *Saunders on Pleading and Evidence*, 641. Plaintiffs were not bound to go through defendants' account and pick out the items which would attach as a lien on the property.

Tuck, Q. C., same side. The fact that the defendants were gratuitous bailees does not enter into the question of damages. They undertook to sell the corn and were bound to do so in a reasonably careful manner. The corn having been lost to the plaintiffs through the negligence of the defendants, they are just as much entitled to have the loss made good as if the defendants were selling on commission. It can hardly be seriously contended that there was not sufficient evidence to warrant the finding.

Judge Palmer had a general authority to take what steps he thought proper, and defendants recognized his authority; this would be sufficient to authorize the demand: *Lamb v. Walker*.⁸

Cur. adv. vult.

The following judgments were now delivered:

WELDON, J. The case was tried at the August Circuit, Saint John, 1879, before Mr. Justice Wetmore.

¹ 4 M. & W. 276.
² 4 Bing. N. C. 64.

³ 4 Barr. 2214.
⁴ L. R. 7 Q. B. 225.

⁵ 2 C. & J., 304.
⁶ 5 C. & P. 322.

⁷ 5 C. & P. 309.
⁸ 3 Q. B. D. 322.

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It appeared in evidence that the plaintiffs who are commission merchants in New York, shipped at the instance of the defendants, who are merchants in Saint John, in June, 1875, 500 bags of corn; when it arrived at Saint John it was found to be heated and musty, and the defendants refused to receive it and had a survey held thereon. The vessel in which the corn came was dry. The defendants sent the survey to the plaintiffs and asked what they should do with the corn. The plaintiffs replied they would assume the invoice, and directed the defendants to dispose of it to the best advantage. The defendants had the corn landed, paid the freight, cartage, and expenses of storing in Robinson's warehouse. The corn was not sold; the plaintiffs urged the sale, and the defendants offered it at a low rate, but failed to obtain a purchaser, it being unmerchantable. Marshall, the plaintiffs' clerk, called on the defendants in the fall for an account thereof; it remaining unsold he failed to obtain a satisfactory return. In November 1876, the plaintiffs employed A. L. Palmer, Esq., a practising barrister and attorney, to call upon the defendants, and the following correspondence passed between them. On the 13th November, the following was addressed to the defendants:

"I have been retained by P. I. Nevius & Son of New York to get them the amount of an invoice of corn shipped by them on your account in June 1875, and you will take notice that I require you to let me know what has become of such corn, and where it is. Second. If sold, let me know who it was sold to, when, and the price, and give me an account of such sale. Third. I require that you will pay the same at once to me. If the above is not complied with legal proceedings will be taken to enforce the claim. An early answer is requested.
Yours, A. L. PALMER."

On the 14th November 1875, the following answer was given:
"To A. L. PALMER, Esq.

We are in receipt of yours of the 13th June 1875. We instructed Messrs. P. I. Nevius & Son of New York, to ship us 1000 bushels of corn. They shipped us 500 bags of corn, which on arrival, we refused to take, and notified them by telegraph that the corn was subject to their order and it was not merchantable, being heated and musty, and could not have been in good order when shipped. After some correspondence about it, they asked us to sell it on their account. We have frequently tried to do so, but could not, and have several times addressed them to that effect, and the whole is yet unsold. We did not care to offer it at auction, as the price it would probably have realized in that way would not we think have been satisfactory.

We hereby advise you that we will have nothing further to do with it, and insist upon Messrs. P. I. N. & Son taking delivery of it and paying us the charges against it at once. If our request is not complied with before the end of this month, we notify you we will have the goods sold at public auction to defray the charges against them.

Yours, SCHOFIELD & BEER."

After receipt of this letter Mr. Palmer called upon the defendants. He stated—

"I think it was between 14th November and 9th December, had a conversation with one of the defendants, I think it was Mr. Beer. Don't recollect all the conversation. I demanded the corn; they may have said I would get an answer from Jack: I am sure they would not give me the corn. I think they did not say anything about charges; may have mentioned charges. Did not say would hold corn for charges. Can't give date."

On the 9th November 1876, Mr. Palmer received the following letter and memo. from Mr. I. Allen Jack:

"Messrs. Schofield & Beer have instructed me to enclose you, as attorney for Messrs. P. I. Névius & Son, a memo. of charges on the part of S. & B. against a cargo of corn which they were requested to endeavor to sell by your clients. As the principal charges are for cash advances, and as the matter has stood unadjusted for some time, Messrs. S. & B. are anxious to secure prompt settlement, and instruct me to request immediate payment of the amount stated in memo. and of the further charges on such corn by Messrs. P. I. N. & Son.

Yours truly, I. ALLEN JACK."

To A. L. Palmer, Esq.

"Memorandum of charges against 500 bags of corn:

1875.					
June	5.	Freight on bags from New York,	\$12 23	527	\$1 23
"	28.	Portwardens certificate, . . .	8 00	504	77
"	30.	Freight on 500 bags corn, . . .	50 00	502	4 81
July	3.	Top-wharfage,	3 00	499	28
"	"	Cartage to warerooms,	8 25	499	78
"	"	Labor at ditto,	14 36		
"	"	Cartage from warehouse, bag, .	30		
"	6.	Telegram,	1 00	496	88
					<hr/>
					\$10 44
1876.					
Aug.	5.	J. & T. Robinson storage bill, .	60 00		
		Loss sustained by S. & B. on corn,	56 55		
		Interest account,	10 44		
					<hr/>
					\$224 13

Subject to Storage from June 28, 1876. Dated 14th Nov., 1876."

Mr. Palmer wrote Mr. Jack he wanted the money or corn,

1881. and in reply, Mr. Jack on the 11th December 1876, wrote Mr. Palmer as follows:

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"Dear Sir,—In reply to your note of the 9th instant, I have to express my surprise that your clients should inform you that Messrs. S. & B. are clearly liable to them in any way on account of the cargo of corn, after the statement in letter to them from Messrs. P. I Nevius & Son of 6th July, 1875, that they had concluded to assume the invoice. I have seen my clients to-day, and am directed by them to say that under all the circumstances *they require the charges to be paid before delivery*. I now enclose bill for storage, the amount of which when added to the total amount as stated in memo. enclosed in my letter of the 9th inst., embraces the full claim of Messrs. S. & B., as they make no claim for the personal trouble they have taken in the matter, which has been so little appreciated.

Yours, &c., I. ALLEN JACK.

To. A. L. Palmer, Esq."

"Messrs. Schofield & Beer,

To J. & T. Robinson, Dr.

To storage of corn from 28th June 1876, six months @ \$5.00,....\$30.00
St. John, N. B., 11th Jan'y, 1876."

No money was tendered to the defendants for this or any part of these charges, and the present action followed.

The corn remained stored. The defendants gave evidence that they tried to sell it to persons in the trade but could not. The corn was unmarketable, and the fire of June following almost wholly destroyed it; what remained was sold at public auction and brought \$25.

A good deal of evidence was given that the corn when purchased in New York and shipped to Saint John was sound and good. On its arrival in Saint John it was found to be heated and musty, a survey was held on it and a certificate of its condition obtained. This certificate was forwarded to the plaintiffs in New York, and they, in answer stated to the defendants, that they assumed the invoice, and directed the defendants on the 6th July 1875, to sell the corn to the best advantage. This being the state of the case, I think the evidence to fix the defendants as purchasers became wholly immaterial.

The correspondence between the plaintiffs' attorney Mr. Palmer, and the defendants', Mr. Jack, clearly established that the defendants' claims for freight, storage, wharfage, labor, &c., were legal charges against the corn, which they had necessarily incurred, and that they had a lien therefore, which they had a

right to have paid, before they delivered the corn as required by Mr. Palmer. It was urged by counsel that as the memorandum contained a charge for loss sustained by the defendants, it was a waiver of their lien. I am of opinion this contention cannot be sustained. The plaintiffs had the items in the memorandum, and no authority was cited to shew that one item in the account not chargeable against the corn, could be held as a waiver of the defendants' lien for the legitimate charges. The rule laid down in 2 Saunders, 47, is, "If the person in whose possession the goods are, has a lien on them, plaintiff may prove a tender of the money before bringing an action of trover. But if he refuses to deliver them on another ground, he cannot afterwards set up the lien as a defence to the action." When demanding the corn Mr. Palmer had an indistinct recollection of charges being claimed by defendants, but any deficiency as to knowledge of the plaintiffs is supplied by the letters which state what the defendants claimed to have a lien upon the corn for, and before the plaintiffs can sustain an action of trover, this sum should have been tendered. The lien is claimed for charges only, not on any other ground.

As to the first count of the declaration, the evidence shewed the corn was musty and had been heated. Several persons—Donavan, Harrison, Finley, Jones, and others, dealers in corn—all declined to buy the corn. One witness stated it was not fit for grinding; only fit for domestic animals. It might, Mr. Harrison said, when landed have been worth 50 cents. The defendant, Beer, stated in his evidence he offered it for 50 cents a bushel, but he could not succeed in getting purchasers, although he took a sample of the corn and went into the market and offered it to several persons. Tried in the fall of 1875, and in 1876, and after the fire saw Mr. Palmer, who consented to the sale by auction, without prejudice to either party, of what remained.

The learned Judge in directing the jury said—"The defendants being authorized by the plaintiffs to sell the corn for them, and the defendants having assumed to act, and taken upon themselves certain responsibilities, were bound to use reasonable care and diligence in looking after the goods, and due and reasonable diligence and promptness in endeavoring

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to sell and dispose of them; and if reasonable diligence and promptness were not used by reason of which the corn was damaged and no sale effected, then the defendants would be liable to answer the plaintiff to the extent of the damage sustained." Then was there negligence? If no negligence the plaintiffs cannot recover on the first count.

I think the learned Judge left the question to the jury to find negligence too broadly. After carefully looking over the notes of the trial I am unable to discover what negligence is referred to. In the plaintiffs' case there is none proved—and the testimony of the defendant, Beer, who had charge of the out-door business of their firm shows what efforts he made to dispose of the corn. This would negative any charge of negligence. I think there should be some evidence upon which a jury could reasonably and properly find, and come to a conclusion—not conjecture. The defendants were instructed to sell to the best advantage. No one can sell unless there are buyers or persons desirous of buying. Negligence should have been defined to the jury. What was it the defendants omitted to do to effect a sale of the corn? It is only on their failing to do what they ought to have done that they can be made liable under the first count of the declaration. The jury found the full value of the corn, when it arrived in Saint John, to be \$500. And, in answer to another question, what was the value when Mr. Palmer called upon the defendants?—the finding was \$350. Had a tender of freight and charges been made and refused, that would have been the proper verdict; but without such tender and a refusal, they could not, I am of opinion, be entitled to a verdict on the trover count. See *Scarfe v. Morgan*.¹

I think the question of the waiver of the lien should have been left to the jury. That may be gathered from the case of *Kerford v. Mondel*,² which was an action of trover against the owner of a vessel to recover goods; he offered to pay the freight as agreed by the bill of lading—the charter party was to pay for dead freight—he offered to pay the freight according to the bill of lading for the carriage and was prepared to pay it—the ship owner refused to deliver the goods except on payment of dead freight. The Court held he was not liable to pay dead

¹ 4 M. & W. 270.

² 5 H. & N. 931.

freight. This was held a dispensation of the tender, and that trover was maintainable. In the present case the particulars of the charges were handed Mr. Palmer, and plaintiffs ought to have made an offer to pay the freight and storage, which amounted to \$180. They had the particulars, and had they proposed to pay this sum, it would be in accordance with *Kerford v. Mondel*; but they were not prepared to pay the legal charges, so as to make it a case of implied dispensation of a tender; and it should have been left to the jury to say whether the tender had been dispensed with.

The evidence is insufficient to warrant the finding on the first count. I am of opinion, therefore, that there should be a new trial.

WETMORE, J. This was an action of trover. The declaration stated, that in consideration that plaintiffs would employ defendants as their agents to sell certain goods, defendants promised plaintiffs to obey the lawful and reasonable orders of plaintiffs in respect to the sale of such goods. That the plaintiffs employed defendants, and they received and had such goods for the purpose and on the terms agreed, and plaintiffs afterwards ordered and directed defendants to sell said goods within a reasonable time thereafter for the best price they could get for the same, the same being a reasonable order, and that though such reasonable time has long since elapsed, defendants did not sell the same but kept the same an unreasonable time until the goods, by so keeping such unreasonable time, were damaged and the price thereof fell in the market, and plaintiffs were put to expense in storing and taking care of the said goods.

2nd count. That defendants converted to their own use, or wrongfully deprived the plaintiffs of the use and possession of, their goods, that is to say, corn.

Then follow all the common counts, as goods sold and delivered, etc., etc.

Pleas. 1st. To first count: did not promise. 2. Second plea to first count: plaintiffs did not deliver said goods to defendants, nor did they receive and have the same for the purpose and on the terms alleged. 3. Third plea to first count: that before a reasonable time elapsed, plaintiffs countermanded the alleged order and ordered defendants to use their own discretion as to

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the time of sale of said goods and the price to be asked therefor, and defendants in the exercise of their discretion did not sell said goods, which is the grievance complained of. 4. Fourth plea to first count: defendants did not keep the goods an unreasonable time. 5. To second count: not guilty. 6. Defendants, as brokers and commission merchants, had goods placed in their hands to sell or return. Expenses necessarily incurred, incidental to storing and safe custody of goods. Defendants claim a lien on said goods, and right to retain them for the lien until it is satisfied, and defendants refuse to return said goods until such lien is satisfied, which is the grievance. 7. To third count: never indebted. 8. As to goods bargained and sold defendants say plaintiffs contracted to deliver goods in merchantable condition, and the only goods plaintiffs offered to deliver under said contract were not in such condition, wherefore defendants refused to accept and pay for the same. 9. As to goods bargained and sold, defendants say that after alleged contract, and before breach, it was agreed the contract should be rescinded.

The following were the questions left to the jury, and their finding on them:—1st. Did the plaintiffs use due and proper care and diligence in endeavoring to have a merchantable article of corn shipped at New York in the defendants' bags? Answer. Yes. 2nd. Was the corn when shipped in New York in a merchantable state? Answer. It was. 3rd. Did the defendants exercise due and reasonable care and diligence in selling and disposing of the corn? Answer. They did not. 4th. If you find they did not, what do you assess the damages at? Answer. \$500. 5th. What do you find the value of the corn at the time Mr. Palmer made the demand? Answer. \$350. 6th. Did Mr. Palmer make any demand of the corn? Answer. He did.

The verdict was entered for the plaintiffs upon the first, second, third, fourth, and fifth issues.—Damages \$500. For defendants on seventh, eighth, and ninth issues. The sixth issue was disposed of by demurrer.

It appeared in evidence that defendants, dealers in grain, &c., had instructed the plaintiffs, who were commission merchants in New York, by telegraph, to purchase a quantity of corn for

them, and ship the same to Saint John, where defendants were engaged in business. The corn was purchased and shipped to Saint John; on arrival, it proved to be in a musty condition, and defendants refused to accept it: telegraphing to plaintiffs on 26th June 1875, that the corn was an old damaged lot, all heated and musty;—hold it to your order;—what shall we do with it?. The plaintiffs concluded to assume the invoice, and telegraphed, 6th July 1875, to sell corn to best advantage. Letters also passed from which it very clearly appeared that the plaintiffs entirely exonerated the defendants from any liability respecting the purchase of the corn on defendants' account, and the corn was left in defendants' hands to be disposed of to the best advantage. Nothing was said as to the time and mode of disposing of the corn. The defendants took charge of the corn, and on the 8th July 1875, wrote plaintiffs they would do the best they could with it, and charge no commission.

The plaintiffs wrote several times respecting the corn; once in Nov. 1875, and again in Jan'y 1876, and they state they received no answer, and supposed it had been sold, and defendants retained the proceeds. The plaintiffs, supposing the defendants had disposed of the corn, and not getting any account, placed the matter in the hands of an attorney, leaving it to him to do as he chose with regard to it; to take what steps he thought proper in order to get plaintiffs' money. The attorney wrote defendants in Nov. 1876, requiring immediate payment, and received an answer dated 14th Nov. 1876, stating they had frequently tried to sell the corn, but could not, and that they had several times advised plaintiffs to that effect. (This was denied by plaintiffs.) That they would have nothing further to do with it, and would insist on the plaintiffs taking delivery of it and paying the charges against it at once. If their request was not complied with by the end of the month they would sell the corn by auction to defray the charges. The corn had materially deteriorated in value from the condition in which it arrived at Saint John, and there was evidence of negligence on defendants' part in respect to disposing of it. The defendants claimed a lien on the corn for charges and expenses connected with it, and rendered a bill of such expenses, and claimed to hold it until such charges and expenses were paid.

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The objection to my charge, in effect that I should have limited the jury in their finding to nominal charges, cannot be sustained. The plaintiffs were entitled to recover such damages as they sustained by reason of defendants' negligence, if negligence was found against them. That was my direction to the jury, and the damages proved were substantial. As to the conversion the plaintiffs proved a demand, and so the jury found. The defendants sought to get rid of the effect of this by reason of a lien on the goods for charges and expenses. A bill of the various charges was rendered amounting to over \$200. Under the evidence I ruled that the lien as claimed (being for the whole amount of the charges) was not sustainable, defendants clearly not having a lien for some of the charges.

On motion for a new trial it was contended that though the defendants could not hold the goods for the full amount they claimed to hold them for, yet if there was a right to hold for any sum, they could hold them until that sum was paid, notwithstanding they claimed to hold them for a larger sum, and *Scarfe v. Morgan*¹ was cited to support that position.

Without discussing the question whether any lien existed, I will consider the question of waiver. In *Kerford v. Mondel*,² Bramwell, B., at page 934 says:—

"There is no doubt he had a lien upon these goods for the true freight, and if he had thought fit to say, 'I detain them on that score,' he would have had a right to do so. But the case of *Scarfe v. Morgan* lays down the law very clearly as to these matters, and it establishes that the plaintiff has a right to maintain this action. The marginal note of *Scarfe v. Morgan* is not quite accurate, because it does not mention that which is contained in the judgment of Baron Parke, that a man may so conduct himself as either to waive the lien or to dispense with the tender of the amount of that lien. That is not mentioned in the marginal note. Now, the effect of Baron Parke's judgment is this: that if a man has two claims for goods, or claims a lien for two different causes on goods, as to one claim rightful, and as to the other wrongful, and he does not in any way indicate that he dispenses with a tender, it seems really that, in that case, a simple refusal to deliver them up would not suffice. But the rest of that judgment is clear to show that if he goes on and so conducts himself as to indicate that a tender of the one amount had been nugatory, he dispenses with the tender. The learned Judge says so in so many words; and to the same effect is the case *Evans v. Nichol*.³ Then as to the matter of fact in this case we can draw a conclusion: we are

¹ 4 M. & W. 270.² 5 H. & N. 961.³ 3 M. & G. 614.

satisfied there is evidence of it, and we conclude that the defendant in effect said, 'I claim these goods in respect of the lien for two different items; you need not trouble yourself to tender one of them, because if you do I shall not deliver them up; I shall keep them for the other.' If that is so, it is a reasonable thing to show that he dispenses with what he owned, would be a nugatory tender of the sum he was entitled to receive. We are of opinion, therefore, that there was a conversion of the goods of the plaintiff, and that he is entitled to maintain the action."

Now quite apart from Judge Palmer's statement, who gave evidence of the demand and refusal to deliver, one of the defendants referring to the charges in respect of which the lien was claimed says, "I meant we were prepared to deliver the corn on payment of these charges, and meant to imply we would not deliver the corn without their paying these charges." Under *Kerford v. Mondel*, with such evidence, a tender of a portion of the amount would not seem necessary to maintain the action. I think there was clear evidence of Judge Palmer's authority to make the demand.

As to the damages, I think, under the finding, they should be confined to the value of the corn at the time the demand was made as found by the jury, \$350. And if the plaintiffs will consent to reduce the damages to that sum, the rule for a new trial will be refused. Plaintiffs to have until the first of next term to signify consent to the reduction, but may do so at any time previous, by filing a written consent with the clerk of this court.

Rule accordingly.

MERRITT ET AL. v. WRIGHT ET AL.

(Equity Appeal.)

[Full Court, before ALLEN, C. J., and WELDON and DUFF, JJ.]

Will—Construction of—Authority to rebuild buildings destroyed by fire—Where buildings destroyed in testator's lifetime—Description of new buildings—Effect of change in the building laws—Power to sell—A mortgage not as a general rule a due execution of a trust for sale and conversion—Insurance—Whether trustees can increase insurance when directed to insure in about the amount in which testator insured—Annuity—When chargeable on a particular fund—When on corpus of estate—Division of annual income of residuary estate—Division of residuary estate—Parties consenting to a decree bound by it—Costs—Appeal.

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The testator devised his house and other buildings on Charlotte street, Saint John, to trustees upon trust, during the life of his wife, to permit her to have the use and occupation of them, and of any building which in case of fire might be substituted in lieu of or to replace the same, and to receive the rents and profits thereof to her own use and benefit. After his death this property was to be conveyed to the rector of Trinity Church, Saint John. He devised his real estate in Queens Ward, and certain stocks and bonds to them, upon certain trusts, and charged the real estate, stocks and bonds with the payment of an annuity of \$5000 to his wife. The will then continued:—"Which annuity shall commence from my decease and be paid quarterly without deduction. And I direct that my said trustees shall stand seized and possessed of this last mentioned real estate, stocks and bonds, and the annual rents, profits, dividends and interest thereof upon trust, by and out of the said rents and profits, dividends and interests, to pay to my said wife the said annuity or clear yearly sum of \$5000 during her life, by even and equal quarterly payments in each year; the first quarterly payment thereof to fall due and be payable at the expiration of three months from and after my decease, and as to the surplus of the said rents, profits, dividends, and interests which shall remain in each year, during the life of my said wife, after payment of the said annuity to her, I direct my said trustees to pay and apply said surplus in like manner as is directed as to the annual income of my residuary estate." The testator also directed the trustees generally to manage the real estate, to keep the house and other buildings on Charlotte street, and the buildings on the Queen's Ward properties in tenantable repair, and insured against loss by fire in about the amounts the testator had then insured upon them, and in case of loss to apply the insurance money towards repairing the damage or in erecting new buildings in lieu of those destroyed; giving them power to erect buildings of a like or of a different character on the same site. In case the insurance money should prove insufficient for the purpose, power was given to use and apply such a portion of the capital of the residuary real and personal estate, not charged with the widow's annuity, as the trustees should deem necessary. All matters and things done in reference to the Charlotte street buildings were to be done with the widow's consent and subject to her approval. The trustees were authorized after the expiration of one year from the testator's death, and at such times thereafter as they should deem most advantageous, to sell the property not charged with the widow's annuity and to stand possessed of the proceeds upon the trusts therein declared. The buildings were burned in the testator's lifetime, and he collected the insurance moneys, with the exception of \$700, a balance due in respect of part of the Queen's Ward properties. This amount was paid to the trustees. The Queen's Ward properties were in the business centre of the city, and without the buildings would bring in little, if any, rental. The testator had commenced to rebuild on one of these properties, all of which continued to belong to him up to the time of his death, and vested in his trustees under the devise to them.

Held, affirming the judgment of the Court below, that as the clear intention of the testator was to provide a residence for his wife during her life, the trustees were authorized to rebuild the house and other buildings on Charlotte street.

Held, that the order of the Court below, that "the trustees were bound to rebuild the dwelling house and such other buildings as were necessary for the comfortable enjoyment of the premises by the widow, of the character, dimensions and capacity, with such offices and appliances as were standing thereon before the fire, as near as might be, consulting the wishes and desires of the widow, and conforming thereto in regard to the dwelling house and appurtenances, and to such changes and alterations therein as she might desire for her personal comfort, so as there should be no material or substantial change therein in any respect, to the injury of the inheritance or otherwise," did not go beyond the powers given to the trustees by the will. Also that the trustees must build such buildings as the law at the time of building allowed.

Held, affirming the judgment of the Court below, that the trustees were authorized to rebuild the buildings on the properties in Queen's Ward.

Held, varying the judgment of the Court below, that the trustees were not authorized to raise the money necessary for rebuilding by mortgaging some part of the real estate not charged with the annuity to the wife.

Held, affirming the judgment of the Court below, that the trustees might insure any new buildings which they might erect, in such sums as they thought necessary to protect the interests of the estate.

Held, affirming the judgment of the Court below, that the testator intended to bequeath to his wife an annuity of \$5000, and that in case the particular property upon which it was made a charge should prove insufficient for that purpose, the amount should be paid in full out of the residuary estate.

After giving a number of general and specific legacies the will directed the trustees to convert the residuary personal estate, not consisting of moneys invested in stocks, funds or securities yielding income, and at their discretion either to get in the moneys so invested, or to allow them so to continue, and after paying the testator's debts and testamentary expenses and the several legacies, to invest the surplus produce thereof, pursuant to general directions for investments thereafter declared. After certain directions as to how sales of real estate should be made, the will proceeds as follows:—"And I direct that my said trustees shall stand possessed of the real estate charged 'with the said annuity' (to the widow) 'subject thereto and of the proceeds thereof when sold, and of all other residuary estate, and of the proceeds thereof when sold, and the investments thereof, and the residue of my personal estate remaining after payment of my debts, funeral expenses and legacies' * * * and the investment of said residue of my said personal estate, and also after the decease of my said wife of the said 160 shares of 'capital stock of the Bank of New Brunswick, and the said £2000 in bonds of 'the Mayor, &c., of the City of Saint John, subject however to any deduction 'therefrom directed or authorized to be made by this my will upon trust as to 'one third part thereof for my nephews, John A. Wright, Charles H. Wright, 'Alexander W. Wright, and Octavius Wright, share and share alike, * * * 'and as to one third part of such residuary estate as aforesaid upon trust, to 'pay unto my brother Nehemiah the net interests and dividends and annual 'income thereof during his life, for his own absolute use and benefit, and after 'the decease of my said brother Nehemiah to pay the said one third part to 'and among the children of my said brother Nehemiah, share and share alike. ' * * * And as to one other equal third part thereof, to pay the same to 'Jane Elizabeth, the wife of my late brother George, for her own absolute use 'and benefit forever." * * * The taxes on the property charged with the annuity to the wife were directed to be paid out of the residuary estate, and directions were given for the investment of the residuary estate in certain specified securities.

Held, that the will gave no authority to the trustees to pay over the income of any portion of the residuary estate to the Messrs. Wright or to Mrs. Jane Elizabeth Merritt during the widow's lifetime. But as all parties interested in the residuary estate had consented to the Court below making a decree allowing this to be done, the appellant, who was one of the assenting parties, must be bound by it.

Held, that the trustees were not authorized to divide the residuary estate during the widow's lifetime, and that the residuary legatees had no right to claim a division on giving security for the payment of the widow's annuity.

The Court below granted the appellant costs out of the estate, but directed the clerk not to tax them until she had withdrawn her opposition to the payment of certain moneys of the estate to the executors in this Province by the executor in the State of New York. It appeared in evidence that by the laws of New York the executor there could not part with the estate until the expiration of eighteen months after the will was proved in that State. This period had not expired at the time when the appellant served the notice on the executor forbidding his parting with the estate or at the time when the decree was made, but had, at the time judgment was given on appeal.

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Held, that the direction as to costs was not a ground of appeal, even though this Court might not have come to the same conclusion as the Judge of the Court below.

Appeal from the judgment of Mr. Justice Fisher, sitting in Equity. The case turned upon the construction of Charles Merritt's Will, the material parts of which are as follows:—

“This is the last will and testament of me, Charles Merritt, of the City of Saint John, in the Province of New Brunswick, esquire.

I appoint my dear wife Susan, my brother Nehemiah Merritt, of Saint Catherines, in the Province of Canada; my nephew William Ingersoll Merritt, of Saint Catherines, aforesaid, John Holden of the said City of Saint John, a clerk at present in my employ, and Charles Holden, of the said City of Saint John, physician, to be trustees and executors of my will. I bequeath to my said wife the sum of one thousand dollars, for her own and absolute use and benefit, to be paid to her as soon as possible after my decease. I also give and bequeath to my said wife the use during her life of my pew in Trinity Church, in the said City of Saint John. I also give and bequeath to my said wife, for her own absolute use and benefit, all my household furniture, plate, linen, china, glass, books, pictures, paintings and other effects in or about my dwelling house at the time of my decease (except money and securities for money, muniments of title, books of account and manuscripts and law books.) I also give and bequeath to my said wife for her own absolute use and benefit, all my jewelry and trinkets, of which I shall be possessed at the time of my decease, together with the carriages, wagons, sleighs, horses, cows, harness and whatever else there may be in my stables belonging to me at the time of my decease. I give and bequeath my gold watch and chain to my nephew, the said William Ingersoll Merritt. I give and bequeath the law library devised to me by my late father and purchased by him from my late brother William, to my nephew John Augustus Wright, for his own absolute use and benefit. I devise and bequeath the land, dwelling house, stables, coach house and premises fronting on Charlotte street, in the City of Saint John aforesaid, which at the date of this my will are in my own occupation, with the right of way to and from the same from King's Square in common with the occupiers of the land, house and premises owned by me, fronting on King's Square aforesaid, unto and to the use of my said wife Susan, the said Nehemiah Merritt, William Ingersoll Merritt, John Holden and Charles Holden, their heirs, assigns forever, *upon trust, during the life of my said wife to permit her to have the use and occupation of the said land, dwelling house, stables, coach house, right of way and premises and of any buildings which in case of fire may be substituted in lieu of or to replace the same, and to receive the rents and profits thereof for her own use and benefit, and upon the decease of my said wife, I direct and declare that the trustees of my will shall convey the said land and dwelling house, coach house and premises with the right of way as aforesaid, unto and to the use of the Rector, Church Wardens and Vestry of Trinity Church, in the Parish of Saint John, incorpor-*

*ated by Act of Assembly of the said Province of New Brunswick, their successors and assigns forever. I give and devise unto and to the use of my said trustees, their heirs and assigns forever, all my lands, buildings, wharves, and premises in Queen's Ward in the City of Saint John aforesaid, lying between Prince William street and Saint John street and extending from Saint John street to or beyond low water mark in the harbor of Saint John aforesaid, upon the trusts hereinafter declared of and concerning the same. I also give and bequeath to my said trustees, their executors, administrators and assigns, one hundred and sixty shares of hundred dollars each of the capital stock of the Bank of New Brunswick in the City of Saint John aforesaid; two thousand pounds in six per cent. bonds or debentures of the Mayor, Alderman and Commonalty of the City of Saint John aforesaid, upon the trust hereinafter declared of and concerning the same. And I hereby charge the said last mentioned lands and premises in Queen's Ward aforesaid, and the said land, house and premises in King's Square in the said city, also the said one hundred and sixty shares of the capital stock of the Bank of New Brunswick, and the said two thousand pounds in bonds or debentures of the Mayor, Aldermen and Commonalty of the City of Saint John, and the rents, dividends, interests and annual income thereof, with the payment of an annuity or clear yearly sum of five thousand dollars, to my said wife, Susan, during her life, which annuity shall commence from my decease, and be paid quarterly without deduction; and I direct that my said trustees shall stand seized and possessed of the said last mentioned real estate, stocks and bonds, and the annual rents and profits, dividends and interest thereof upon trust, by and out of the said rents, profits, dividends and interests upon trust, by and out of the said rents and profits, dividends and interest, to pay to my said wife the said annuity, or clear yearly sum of five thousand dollars during her life, by even and equal quarterly payments in each year, the first quarterly payment thereof to fall due and be payable at the expiration of three months from and after my decease, and as to the surplus of the said rents, profits, dividends and interests which shall remain in each year during the life of my said wife, after payment of the said annuity to her, I direct my said trustees to pay and apply the said surplus in like manner as is directed as to the annual income of my residuary estate. And I direct, that from and after the decease of my said wife, my said trustees shall sell the said lands, tenements, wharves and premises situate between Prince William street and Saint John street, extending from Saint John street to or beyond low water mark in the harbor of Saint John aforesaid; and I direct that the trustees shall stand possessed of the net proceeds of such sale upon trust, to invest the same pursuant to the directions for investment hereinafter contained, and to hold such proceeds and the investments thereof upon the trusts, provisions and directions hereinafter contained of and concerning my residuary estate. * * * I give and devise all the rest and residue of the real estate which shall belong to me at the time of my decease, unto and to the use of my said trustees, their heirs and assigns upon trust, after the expiration of one year from my decease, at such time or*

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times thereafter as my said trustees shall, in their discretion, deem most advantageous to sell and dispose of the same, and to stand possessed of the net proceeds of such sale or sales thereof, and of the net rents and profits which may be received by them, upon the trusts and subject to the direction hereinafter contained of and concerning my residuary estate; and I direct that my said trustees shall, during the life of my said wife, keep the said dwelling house, coach house and stables, and until sale of the rest of my real estate, keep all the buildings and erections thereon in tenantable repair, and insured against loss by fire to about the amounts now insured by me on the same respectively, and I direct that any moneys which may, in case of loss by fire, be payable under any insurance aforesaid, shall be applied by my said trustees in or towards repairing the damages occasioned by such fire, or in or towards erecting buildings of the like, or of a different character, on the same site; if the sum received from such insurance shall, in the judgment of my said trustees, be insufficient for repairing the damages occasioned by any such fire or for re-erecting new buildings in lieu of those destroyed, I hereby direct and authorize my said trustees to use and apply such portion of the capital of my residuary, real and personal estate not appropriated to or charged with the said annuity to my said wife, as they, my said trustees, shall deem necessary for such purpose; and I authorize my said trustees until the sale of my said real estate to let the same, or any part or parts thereof, except the said dwelling house, coach house, stables and premises fronting on Charlotte street, from year to year, or for any term of years which shall terminate within five years from the time of the making thereof at such rents as in the judgment of the said trustees shall be reasonable, and I declare that the rents and profits of my trust estate from time to time remaining unsold, except as aforesaid, shall be received by my said trustees and be applied in the same manner as the income of the produce of such estate, if sold under the authority of this my will would be applicable; and I empower my said trustees until sale of my said real estate, under the directions of this my will, generally to manage the said real estate, but nevertheless all repairs to and all matters and things done in reference to the said dwelling house, coach house, stables and premises fronting on Charlotte street aforesaid, shall during the life of my said wife, be done with her consent and be subject to her approval; and I direct that all taxes, rates and assessments, provisions, parochial or otherwise imposed or assessed during the life of my said wife upon or in respect of the said dwelling house, coach house, stable and premises shall be paid by my said trustees out of the income of my residuary estate. I give and bequeath the residue of my personal estate unto my said trustees, their executors, administrators and assigns, upon the trusts following, that is to say: upon trust thereout to pay my just debts, and funeral and testamentary expenses, and also the following legacies, namely, * * * eleven thousand dollars of Pacific and Missouri Railroad Bonds to the said Rector, Church Wardens and Vestry of Trinity Church, in the Parish of Saint John, incorporated by Act of Assembly of the said Province of New

Brunswick, the same being in addition to the devise to them hereinbefore mentioned. * * * I direct that my said trustees shall convert my said residuary personal estate not consisting of money invested in stocks, funds or securities yielding income (other than personal securities), and shall, at their discretion, either get in the moneys invested, as last aforesaid, or permit the same to continue so invested, and shall after payment thereof of my said debts and funeral and testamentary expenses and the said legacies, and after setting apart the said ten thousand dollars of Chesapeake and Ohio Railroad Bonds for the benefit of the said Charles H. Wright and his wife and children as aforesaid, and after assigning the said mortgage to the said Catherine Ingersoll, invest the surplus produce of the said trust property so converted or gotten in, pursuant to the general directions for investing, hereinafter contained. I direct that all sale or sales of my real estate may be made in one lot or in parcels by public auction or private contract, or part thereof one way and part thereof the other way, with full power to my said trustees to fix reserve biddings, and to buy in any lot or lots at any auction, and to rescind or vary any contract for sale without being liable for any consequential loss, and also to execute from time to time such instruments and assurances as shall be requisite for affecting and completing any sale or sales of my said estate. And I direct my said trustees to pay and retain to themselves all expenses of, and incident to, such sale or sales, out of the proceeds thereof. And I direct that my said trustees shall stand possessed of my real estate, charged with the said annuity subject thereto, and the proceeds thereof when sold, and all other residuary estate and the proceeds thereof when sold, and the investments thereof, and the residue of my personal estate remaining after the payment of my debts, funeral expenses and legacies, and after setting apart the said ten thousand dollars of Chesapeake and Ohio Railroad Bonds, and the investment of said residue of said personal estate; and also after the decease of my said wife, of the said one hundred and sixty shares of the capital stock of the Bank of New Brunswick, and the said two thousand pounds in bonds of the Mayor, Aldermen and Commonalty of the City of Saint John aforesaid, *subject, however, to any deduction therefrom directed or authorized to be made by this my will upon trust*, as to one-third part thereof for my nephews, John A. Wright, Charles H. Wright, Alexander E. Wright and Octavius Wright, share and share alike, for their own absolute use and benefit; and I declare, that in case of the death of any or either of my said nephews, John A. Wright, Charles H. Wright, Alexander E. Wright and Octavius Wright in my lifetime, the proportions in his or their favor hereby made, shall not lapse, but shall take effect as if the death of such nephew or nephews had happened immediately after my death. And as to one other third part of such residuary estate as aforesaid upon trust, to pay unto my brother, Nehemiah, the net interests, dividends and annual income thereof, during his life, for his own absolute use and benefit; and after the decease of my said brother, Nehemiah, to pay the said one-third part to and among the children of my said brother, Nehemiah, share and share alike; and in the event

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of the death of any child or children of my said brother, Nehemiah, leaving issue, the issue of such child or children to take the share of their respective parent or parents so dying; but so nevertheless that the respective child or children of my said brother, Nehemiah's children, shall have his or their parent's share, or respective parent's share only. And as to one other equal third part thereof, to pay the same to Jane Elizabeth, the wife of my late brother, George, for her own absolute use and benefit forever; and I further direct, that in the event of the said Jane Elizabeth wife of my late brother, George, dying in my lifetime, leaving issue, such issue shall take the share that their mother, if living, would have been entitled to receive under this my will. And I further direct, that on failure of the trusts of any of the said third parties of the said residue the part or parts of the trusts which shall so fail with all accretions thereto shall be added to the other or others equally of the said third parts, and be subject to the trusts and provisions herein declared or referred to concerning the part or parts to which the same shall attach. I direct that all investments, to be made in pursuance of my will, shall be made in or upon first mortgages of freehold estate, or in or upon the stocks of any bank or banks of good repute, or in or upon any other good securities in the Province of New Brunswick or elsewhere (other than personal securities) and that my said trustees shall have power, in their discretion, to vary such investments for any other investments of the description specified in this direction. * * * And I do hereby direct and declare that the bequest to and provisions for my said wife, hereinbefore made, shall be in lieu of and in full satisfaction for her dower and all claims upon my real estate or property. And I further declare that the five city debentures, numbers three hundred and thirty-six to three hundred and forty, inclusive, amounting to five thousand dollars, were, on the 8th day of July, in the year of our Lord one thousand eight hundred and sixty-nine given by me to my said wife, and were then her property, and are not to be considered as forming part of my personal estate." etc. * * *

Provision was also made for the appointment of new trustees and for other matters, one of which was that Alexander P. Irvin, of New York, should be executor there for the purpose of getting in the testator's estate in New York, and handing it over to his executors in this Province.

The buildings on Charlotte street, as well as the other buildings in Queens Ward were burned during the testator's lifetime, and he collected the insurance, except the sum of \$700, which after his death was paid to his executors on account of part of the Queen's Ward property. He had commenced to rebuild part of the buildings in Queen's Ward. After the fire and before his death the Legislature had enacted a law dividing the city into districts and regulating the description of buildings that could be erected in the several districts.

Jane Elizabeth (Mrs. George) Merritt notified Alex. P. Irvin not to part with, or pay over to the executors and trustees in New Brunswick, the moneys and estate in his hands.

The executors filed a bill against John A. Wright, Charles H. Wright, Alexander E. Wright, Octavius Wright, Jane Elizabeth Merritt, Susan Merritt and the Rector, etc., of Trinity Church. The bill concluded with the following prayer:—

“First. As to the said Charlotte street dwelling house, coach house, stables and premises, that it may be declared whether or not the said plaintiffs, as executors and trustees under the said will are bound to or justified in rebuilding the same, and if so, whether a greater sum than that insured upon the same and received by the said Charles Merritt in his lifetime can be used for such purpose, and if more money is to be used for such purpose, then that it may be declared and decreed whether or not the same is to be taken and raised out of the residuary estate devised by the said will, and whether or not the same or any part thereof may be sold or mortgaged for such purpose.

Second. As to the said real estate in Queen’s Ward, and which is particularly charged with the said annuity of five thousand dollars to the said defendant, Susan Merritt, the widow of the said testator, Charles Merritt, that it may be declared and decreed whether or not the said plaintiffs as such executors and trustees as aforesaid are bound to or justified in erecting upon the same new buildings to replace those which were so, as aforesaid, destroyed by the great fire of June, in the year of our Lord one thousand eight hundred and seventy-seven, and if so, whether or not the funds to erect such new buildings shall be taken out of the corpus of the estate not specifically bequeathed or devised, or out of the income thereof, or how otherwise.

Third. As to the said annuity of five thousand dollars to the said defendant, Susan Merritt, that it may be declared and decreed whether or not the said annuity is chargeable on the corpus of the estate not specifically devised or bequeathed, or is chargeable upon the income only of that portion of the real estate lying in Queen’s Ward, and the Bank of New Brunswick stocks and Corporation bonds, particularly named in the will as being the source out of which such annuity is primarily payable, or how the said annuity is chargeable and payable, and that if any portion of the corpus of the estate shall be decreed to be chargeable with the payment of the said annuity, whether or not the same, or any part thereof, may, in case the rents of the said Queen’s Ward property, with the dividends and interest of the said bank stock and corporation bonds shall be insufficient for the purpose of paying the said annuity without further orders or decree of this honorable Court, be sold or mortgaged by the plaintiffs as such executors and trustees, for such purpose, for such price or sums of money as they, the said plaintiffs as such executors and trustees, shall deem advisable.

Fourth. As to the residuary estate in and by the said will devised to the plaintiffs in trust for the defendants, John A. Wright, Charles H. Wright, Alexander E. Wright and Octavius Wright, and for the

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defendant, Jane Elizabeth Merritt, and for the defendants, Nehemiah Merritt and William Ingersoll Merritt, that it may be declared and decreed whether or not any division of the corpus of the said residuary estate can, under the terms and provisions of the said will, be made until after the death of the said defendant, Susan Merritt, the widow of the said testator.

Fifth. As to the income of the said residuary estate, that it may be declared and decreed that all the rates and taxes imposed upon the whole estate, real and personal, of which the said Charles Merritt died seized or possessed, and all premiums of insurance already paid or hereafter to be paid by the said plaintiffs, or any policy or policies of insurance now or hereafter to be effected by them as such executors and trustees as aforesaid, upon any of the property of the said estate, and all the expenses of managing the said estate, and all other charges against the said estate, are a first charge upon and payable out of the income of the said residuary estate, or out of the corpus of the same, and that it may further be declared and decreed whether or not (after deducting the said charges above named), the balance of the income of the said residuary estate shall be paid over by the said plaintiffs as such executors and trustees as aforesaid, to the several legatees of the said residuary estate, or to any and which of them, or how such income is to be disposed of by the said plaintiffs as such executors and trustees as aforesaid.

Sixth. That in case it shall be declared that under the terms and provisions of the said will of the said Charles Merritt, deceased, no division of the corpus of the said residuary estate can be made by the plaintiffs as such executors and trustees as aforesaid, until after the death of the said Susan Merritt, the widow of the said testator; but that nevertheless if it shall be made to appear by the said defendants John A. Wright, Charles H. Wright, Alexander E. Wright and Octavius Wright, and by the defendant, Jane Elizabeth Merritt, residuary legatees under the said will, or by any other residuary legatee, entitled after the death of the said Susan Merritt to any part of the said residuary estate, to the satisfaction of the said plaintiffs as such executors and trustees as aforesaid, that they, the said plaintiffs, (after retaining in their hands a sufficient amount of the said residuary estate to satisfy and discharge the said yearly taxes and charges against the whole estate of the said Charles Merritt, deceased, and the said costs and expenses of managing the same year by year), may safely divide and pay over to the several legatees entitled to the same, the remainder of the said residue in the proportion and in the manner directed by the said will, in case all the legatees of the said residuary estate shall give their consent in that behalf to the said plaintiffs as such trustees and executors as aforesaid; that then it may be ordered and decreed that the said plaintiffs, as such executors and trustees as aforesaid, may, if they so please, but nevertheless only by and with the consent of all the said legatees as aforesaid of the said residuary estate, pay and hand over the remaining, or any portion of the corpus of such residuary estate, to such of the said legatees as shall be entitled to receive the same, and that all such payments or delivery over of

any portion of the said residuary estate, shall be valid and effectual *pro tanto* against such legatees or legatee as shall or may receive the same.

Seventh. That in case it shall be ordered and decreed that the said plaintiffs as such executors and trustees as aforesaid, shall be bound to or justified in rebuilding any of the houses or erections so as aforesaid destroyed by the said great fire, that then it may be declared and decreed whether or not the said plaintiffs have power to insure the new buildings, by them to be erected, for any greater amount than had been insured by the said Charles Merritt in his lifetime, in the buildings standing on the same places, and which were so destroyed by fire as aforesaid.

Eighth. In reference to the investment of moneys, which in and by the said will the said plaintiffs, as such executors and trustees as aforesaid, are directed from time to time to make, that it may be declared and decreed what shall be the nature and description of the stocks and the securities in which such investments should be made, and also that it may be declared whether or not the bank stocks and other securities held by the said Charles Merritt in his lifetime ought to be permitted by the plaintiffs, as such executors as aforesaid, to remain, or should be sold and disposed of as soon and in such manner as to the said plaintiffs, as such executors and trustees, shall seem most advisable.

Ninth. That it may be declared that the defendant, Jane Elizabeth Merritt, had no right, just cause or excuse to take any steps whatever to prevent the said Alexander P. Irvin, the executor of the said will in New York from handing over to the plaintiffs, executors and trustees as aforesaid, the moneys, stocks and other property belonging to the estate of the said Charles Merritt in New York or elsewhere in the United States, and that she the said defendant, Jane Elizabeth Merritt, be ordered and decreed forthwith to withdraw her said protest and to cease all opposition whatever to the paying and handing over by the said Alexander P. Irvin as such executor in New York, to the said plaintiffs and trustees as aforesaid of the said moneys and other property belonging to the said estate of the said Charles Merritt in New York or elsewhere under the control or in the possession of him the said Alexander P. Irvin as such executor in New York as aforesaid; and

Lastly, That the rights of all the defendants in the premises may be declared and decreed.

After hearing the parties, Mr. Justice Fisher gave judgment, and made the following declaration:—

1. Declare that the trustees and executors are bound to rebuild the dwelling house, coach house, stables and such other erections as are necessary for the comfortable enjoyment of the said premises by Susan Merritt, widow of the testator, of the character, dimensions and capacity with such offices and appliances as were standing thereon before the fire as near as may be, consulting the wishes and desires (and conforming thereto) of the said Susan Merritt with regard to the said

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dwelling house and other appurtenances and to such changes and alterations therein as she may desire for her personal comfort so that there shall be no material or substantial change therein in any respect to the injury of the inheritance or otherwise.

2. Declare that the money required to erect such buildings shall be taken out of the residuary estate of the said Charles Merritt either from the sale of such portion of the capital of such residuary estate as may be necessary, or by mortgaging or charging the same or some portion thereof for that purpose or part from each or either, but no mortgage or charge for this purpose shall be made on the said land in Charlotte street on which the said dwelling house and the appurtenances are situate, nor in any part of the real estate in Queen's Ward or King's Square specifically charged with the annuity to the said Susan Merritt, nor on the bank stock or corporation bonds as charged.

3. Declare that the Rector, Church Wardens and Vestry of Trinity Church, in the City of Saint John may require the erection of the dwelling house with the appurtenances, on the lot of land on Charlotte street, in the manner I have stated, by the said trustees and executors, submitting to such changes and alterations from the former dwelling house and appurtenances as the said Susan Merritt may require for her personal comfort, only that such changes and alterations shall not be made in such a manner as materially to injure the reversion without the assent of the Rector, Church Wardens and Vestry of Trinity Church.

4. Declare that the trustees and executors are bound to erect upon the real estate situate in Queen's Ward, in the City of Saint John, which is specifically charged with the annuity of five thousand dollars to Susan Merritt, new buildings, to replace those which were destroyed by the great fire of June, in the year of our Lord one thousand eight hundred and seventy-seven, of such character, dimensions and capacity and adapted to such purpose as the position of the said land in relation to the business of the city will warrant and as will be most productive and beneficial to the estate of the said Charles Merritt, and the funds required for that purpose shall be taken out of the residuary estate by a sale of such portion of the capital as the trustees and executors may deem necessary, or by mortgaging or charging the same therewith, or some portion thereof, or by mortgaging the said property in Queen's Ward and King's Square, or from any or either of these sources, or part from any or either, as the trustees and executors in their discretion may deem most promotive of the interest of the estate.

5. Declare that the annuity of five thousand dollars to the said Susan Merritt is chargeable upon the goods and premises in Queen's Ward, and the said land, house and premises on King's Square, in the City of Saint John; also the said one hundred and sixty shares of the capital stock of the Bank of New Brunswick, and the said two thousand pounds in bonds or debentures of the Mayor, Aldermen and Commonalty of the City of Saint John, and also upon the rents, dividends and interest and annual income thereof, and that it is also chargeable upon the capital of the whole residuary, real and personal estate, and that in the event of any failure on the part of the lands

and premises in Queen's Ward aforesaid, and the land, house and premises on King's Square aforesaid, and the bank stock and corporation bonds to pay or produce sufficient annual income to pay the said annuity, freed from all charges whatever, then such deficiency may be made up from time to time as such deficiency may arise, by the executors and trustees as aforesaid, either by the sale of such part or portion of the capital of the residuary, real or personal estate as may be necessary for that purpose, or by mortgaging or charging the same therewith, or any part or portion thereof, or by mortgaging the said lands, premises and bank stocks and corporation debentures specifically charged therewith or part from either or all as the executors and trustees in their discretion may deem most prudent and advisable and promotive of the interest of the estate, having due regard to the permanent security of the said annuity and the maintenance of the fund necessary for the payment thereof to the said Susan Merritt during the period of her natural life.

6. Declare that the residuary estate devised to the plaintiffs in trust for the defendants John A. Wright, Charles H. Wright, Alexander E. Wright and Octavius Wright, and for the defendant Jane Elizabeth Merritt, and for the defendants Nehemiah Merritt and William Ingersoll Merritt, cannot be divided under the provisions of the said will, until after the death of the said Susan Merritt, widow of the testator.

7. Declare that all the rates and taxes imposed, or which may hereafter from time to time be imposed upon the whole real or personal property of which the said Charles Merritt died seized or possessed and all premiums of insurance already paid or hereafter from time to time to be paid or any policy or policies of insurance now or hereafter from time to time to be effected by the plaintiffs as such trustees and executors as aforesaid upon any of the property of the said estate, and all such sums of money required to pay for repairs of any of the buildings of the said estate herein mentioned, and all the expenses of managing the said estate and all other costs and charges against the said estate are and shall be a first charge payable out of the income of the residuary estate.

18. Declare that the balance of the income of the said residuary estate after deducting the said rates and taxes and the premiums of insurance paid, and all sums of money paid for repairs and the costs and expenses of the management of the said estate, shall as to one-third part thereof, be paid to the defendants John A. Wright, Charles H. Wright, Alexander E. Wright and Octavius Wright, and as to one-third part thereof to the defendant Jane Elizabeth Merritt, and as to one-third part thereof to the defendant Nehemiah Merritt, and in case of the death of any or either of the said residuary legatees to the issue of the persons entitled thereto according to the directions of the said will.

9. Declare that if it shall be made to appear by the said defendants John A. Wright, Charles H. Wright, Alexander E. Wright and Oc-

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¹This declaration was the result of an agreement between all the parties interested in the residuary estate.

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tavius Wright, and by the defendant Jane Elizabeth Merritt, residuary legatees under the said will, or by any other residuary legatee entitled after the death of the said Susan Merritt to any part of the residuary estate to the satisfaction of the plaintiffs, as such executors and trustees as aforesaid, that the said plaintiffs after retaining in their hands a sufficient amount of the residuary estate to satisfy and discharge the yearly taxes and charges of every kind against the whole estate of the said Charles Merritt, and the said costs and expense of managing the same year by year, may safely divide and pay over to the several legatees entitled to the same the remainder of the said residue in the proportions and in the manner directed by the said will if all the legatees of the said residuary estate being competent to contract shall give their consent in that behalf to the said plaintiffs, as such trustees and executors as aforesaid; then on such consent of the said residuary legatees being given to the satisfaction of the said plaintiffs, trustees and executors as aforesaid, I do order and decree that the said plaintiffs, executors and trustees as aforesaid may if they please, and only with the assent of all the residuary legatees competent to contract, pay and hand over the remaining or any portion of the capital of the said residuary estate to such of the legatees as shall be entitled to receive the same, which payment and delivery over of any portion of the said residuary estate shall be valid and effectual *pro tanto* against such legatee or legatees as shall or may take and receive the same, which transfer and delivery of the said residuary estate or any portion thereof the said executors and trustees may from time to time make in their discretion, if they are made satisfied of the propriety thereof by the said residuary legatees and with the assent of all the residuary legatees being competent to contract, having regard to the safety of the annuity to the said Susan Merritt and with her assent.

10. Declare that the said trustees and executors shall and may insure the new buildings to be erected on Charlotte street, or in Queen's Ward, or on any other part of the real estate of the said testator, in the City of Saint John, in such sum and to such amount or amounts respectively, as they in their discretion deem necessary for the protection of the interest of the said estate, and that they are not limited to the amount for which buildings on the same site were formerly, in the lifetime of the said Charles Merritt, insured.

11. Declare that as to the investment of the moneys of the said estate, that without excluding such securities as the trustees and executors may in their discretion deem safe; that investments may be made in the debentures or other securities of the Dominion of Canada, or of the Province of New Brunswick, or of any of the municipalities in the Province of New Brunswick, and also in first mortgages upon estates held in fee simple, but not in the stock of any trading corporation, unless in accordance with the directions of the will.

12. Declare that the bank stock and other securities held by the said Charles Merritt in his lifetime may be held or disposed of, or such parts thereof disposed of as the said executors and trustees in their discretion deem most advisable, and if sold and disposed of, reinvested and disposed of in the manner hereinbefore described.

13. Declare that the said defendant, Jane Elizabeth Merritt, had no right, just cause or excuse to take any steps whatever to prevent the said Alexander P. Irvin, the executor of the said will in New York, from handing over to the plaintiffs, executors and trustees as aforesaid the money, stock and other property belonging to the estate of the said Charles Merritt in New York or elsewhere in the United States; that the action of the said defendant Jane Elizabeth Merritt in this respect was altogether unwarrantable, that her notice and direction to the said Alexander P. Irvin not to pay over or deliver the funds and securities of the said testator in New York to the executors and trustees aforesaid was in direct violation of the plain directions of the testator and a most unjustifiable attempt to stay the delivery of the stock and effects of the said testator in New York to the plaintiffs, executors and trustees as aforesaid, and to interfere with their undoubted right under the will of the said Charles Merritt, to hold, control and manage the said stock and effects for the purpose of the said estate and according to the directions of the said will, and finally to distribute, pay over and appropriate the said stock and effects and the income, issues and profits thereof, according to the intention and direction of the said testator Charles Merritt, so fully and plainly stated in the said will, and I do order and decree that the said Jane Elizabeth Merritt do forthwith withdraw her said protest and notice to the said Alexander P. Irvin, and do cease all opposition whatever to the payment and handing over by the said Alexander P. Irvin as such executor in New York to the plaintiffs as such executors and trustees as aforesaid, of all the moneys, bonds, stock and evidences thereof, and all other securities for moneys, effects and property belonging to the estate of the said Charles Merritt in New York or elsewhere in the United States under the control or in the possession or subject to the order of him, the said Alexander P. Irvin, as such executor in New York aforesaid.

14. Declare that the costs of all parties, plaintiffs and defendants respectively, be paid out of the estate of the said Charles Merritt, and I do further declare and decree that notwithstanding my declaration that the costs of the said Jane Elizabeth Merritt shall be paid out of the said estate, that the clerk shall not tax such costs for the said Jane Elizabeth Merritt until it shall be made to appear to him that she has ceased and withdrawn all opposition in New York to the said Alexander P. Irvin paying over and delivering to the plaintiffs, executors and trustees as aforesaid the said trust funds, effects and property belonging to the estate of the said Charles Merritt in New York or elsewhere in the United States, nor shall any such taxation take place or any such costs be paid unless the certificate or other sufficient proof to the satisfaction of the said clerk of the withdrawal of the said Jane Elizabeth Merritt hereinbefore mentioned shall be filed with the said clerk within one calendar month after settling the decree in this case."

And it was decreed accordingly. From this decree the defendant, Jane Elizabeth Merritt, appealed.

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October 27th and 29th, 1880. *T. C. Allen* and *C. A. Palmer* supported the appeal. The objections to the judgment of the Court below (which were stated at great length in the notice of appeal) were, on argument, reduced substantially to the following, as given in the judgment of the Court.

1. That the trustees were not authorized by the will to rebuild the buildings on the Charlotte street property, or on the Queen's Ward property. The will must be construed with reference to the testator's property immediately before his death: *Wagstaff v. Wagstaff*; ¹ *Hepburn v. Skirving*; ² *Theobald on Wills*, pp. 83, 84; and *Williams' Exors.* (8th ed.) 225, note *d*.

2. If they were justified in rebuilding, they could not erect buildings of a different description from those upon the property before the fire.

3. That they had no right to apply any part of the residuary estate toward the erection of the buildings, or to sell or mortgage any part to raise money for that purpose.

4. That the trustees were not authorized to insure any new buildings for a larger sum than had been insured by the testator on the old buildings.

5. That the annuity to the testator's widow was chargeable only on the rents and interests of the property specifically devised and bequeathed for the purpose, and could not, in case of such rents, etc., proving insufficient, be paid out of the residuary estate: *Welby v. Rockcliffe*.³ If the property is destroyed by the *vis major* she must be the loser: *Dickin v. Edwards*; ⁴ *Spurway v. Glyn*; ⁵ *Ashburner v. Macguire*; ⁶ *Cowper v. Mantell*; ⁷ *Jones v. Green*; ⁸ *Durrant v. Friend*; ⁹ *Theobald on Wills*, 471; *Bright v. Larcher*; ¹⁰ *Baker v. Baker*; ¹¹ *Foster v. Smith*; ¹² *Forbes v. Richardson*; ¹³ *Darbois v. Rickards*.¹⁴

6. That the residuary legatees were entitled to have the residuary estate divided among them before the death of the testator's widow: 2 *Williams Exors.* (ed. 1879) 1351.

7. That the judge was not warranted in imposing as a condition to granting the appellant costs, that she should withdraw her opposition to the executor in New York paying over to

¹ L. R. 8 Eq. 229.

² 4 Jur. N. S. 651.

³ 1 Russ. & My. 571.

⁴ 4 Hare. 27d.

⁵ 9 Ves. 482.

⁶ 2 Br. Ch. Cas. 106.

⁷ 22 Beav. 223.

⁸ L. R. 5 Eq. 555.

⁹ 5 DeG. & Sm. 343.

¹⁰ 3 DeG. & J. 143.

¹¹ 6 H. L. Cas. 616.

¹² 1 Phil. R. 629.

¹³ 11 Hare 354.

¹⁴ 14 Sim. 437.

the executors in this Province the funds in the United States, belonging to the testator's estate.

S. R. Thomson, Q. C., for the executors. The will directs the trustees to stand seized, etc., of the property upon trust for division after Mrs. Merritt's death. Mr. Justice Fisher's decision makes no difference to the executors on this point; but there can be but one division, and that only after the widow's death.

Kaye, Q. C., for Mrs. Susan Merritt the widow. The legacy is a demonstrative legacy. It will be well before dealing with the words of the will to notice the peculiar characteristics of a demonstrative legacy: 2 Wms. Ex. 265. In general it will on failure of the special fund draw upon the general body of the estate; if the general estate fail it still has the fund specially charged. It is the most desirable of all legacies.

The difference is further pointed out in Wms. Ex. at p. 1171. (1.) A gift of an annuity with directions to pay out of a particular fund or the income of a particular fund does not of itself relieve the general estate: *Mann v. Copland*.¹ (2.) The mere charge of an annuity on a particular fund or the income of a particular fund, does not relieve the general estate. (3.) The mere charge on a particular fund with direction to pay out of that fund, or the income of that fund, does not relieve the general estate. (4.) Where we find an annuity charged on or payable out of a particular fund it is for the parties claiming that the annuity is confined to that particular fund to shew it affirmatively.

By the will the testator: (1.) Devises lands, stock, &c., to trustees to hold upon certain trusts: (2.) To give an annuity to his wife, without deduction, charging a certain part of the estate with the annuity: (3.) He directs his trustees what to do with the income of that specifically devised property. He does not indeed say I give an annuity and charge it upon certain property. He charges the property with something: that something is the annuity, and it is immaterial as to the order of the words. It is a clear gift of an annuity, not given out of the property, but charged upon it, and nowhere is his other property excepted from the charge. We have a charge

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 v. the counsel opposed admit; if it exists, it is chargeable on the
 WRIGHT. general estate. The testator says, "the annuity shall com-
 mence from my decease, and shall be paid quarterly, without
 deduction."

He cited *Theob. on Wills*, pages 83, 84, and 471, 472; *Dickin v. Edwards*;¹ *Theob. on Wills*, p. 32 and 33; *Savile v. Blacket*;² *Spurway v. Glyn*;³ *Paget v. Huish*;⁴ *Everett v. Everett*;⁵ *Bullock v. Bennett*;⁶ *Cave v. Cave*;⁷ *Price v. Parker*.⁸

October 31, 1879. *Weldon, Q. C.*, (with whom was *Sturdee*) for Trinity Church, cited: *Gee v. Mahood*;⁹ *Morrice v. Alymer*;¹⁰ *Wms. on Exors*, p. 225, note (d); *Everett v. Everett*;¹¹ *Douglas v. Douglas*;¹² *Cole v. Scott*;¹³ *Mathews v. Foulsham*;¹⁴ *Mytton v. Mytton*.¹⁵

E. L. Wetmore was heard for Nehemiah and Ingersoll Merritt, and *John A. Wright* for the Messrs. Wright.

Allen and Palmer in reply.

Cur. adv. vult.

The judgment of the Court was now delivered by

ALLEN, C. J. This was an appeal from a decree of His Honor, Mr. Justice Fisher.

A great number of objections were taken to the judgment of the learned Judge, but on the argument they were reduced substantially to the following:—

1st. That the trustees were not authorized by the will to rebuild the house, &c., on the Charlotte street property, or on the property in Queen's Ward:

2nd. If they were justified in rebuilding, that they could only erect the same description of buildings as were upon the property before the fire of June, 1877:

3rd. That they had no right to apply any part of the residuary estate towards the erection of the buildings, or to sell or mortgage any part of the residuary estate to raise money for that purpose:

¹⁴ Hare, 278.

²¹ P. Wm. 778.

²⁹ Ven. 483.

⁴¹ H. & M. 668.

⁵ L. R. 6 Chan. Div. 122 &

" 7 " 428.

⁶⁷ DeG. M. & G. 518.

⁷² Eden. 144.

¹⁶ Sim. 198.

⁵ L. R. 11 Chan. Div. 891.

¹⁰ L. R. 7 H. L. 727.

¹¹ L. R. 6 Chan. Div. 122 and 7 do. 428.

¹² Kay, 400.

¹¹ McN. & G. 518.

¹⁴ L. R. 2 Eq. 609.

¹⁵ L. R. 19 Eq. 30.

4th. That the trustees were not authorized to insure any new buildings for a larger sum than had been insured by the testator:

5th. That the annuity to the testator's widow was chargeable only on the rents and interests of the property specifically devised and bequeathed for the purpose, and could not, in case of such rents, &c., proving insufficient, be paid out of the residuary estate:

6th. That the residuary legatees (of whom the appellant Mrs. Jane Elizabeth Merritt was one), were entitled to have the residuary estate divided among them before the death of the testator's widow:

7th. That the Judge was not warranted in imposing as a condition to granting Mrs. Jane Merritt her costs of the defence, that she should withdraw her opposition to the executor in New York paying over to the executors in this Province the funds in the United States, belonging to the testator's estate.

The first question—the right of the trustees to rebuild on the Charlotte street property is a very important one, and by no means free from difficulty. The testator devised this property to his trustees, upon trust, during the life of his wife, to permit her to have the use and occupation of it, “*and of any building which in case of fire may be substituted in lieu of or to replace the same*, and to receive the rents and profits thereof for her own use and benefit.” In a subsequent part of his will he directs his trustees to keep the house and the other buildings on the property in tenantable repair and insured against loss by fire during the life of his wife, and in case of loss, to apply the insurance money towards re-erecting new buildings in lieu of those destroyed.

The only difficulty in giving effect to these provisions arises from the fact of the buildings having been burnt during the testator's lifetime. It has been contended that, as by the terms of the Wills Act, the will must be construed as if executed immediately before the death, these provisions can have no operation, because at that time there was no house or buildings on the property, and no insurance money to come into the hands of the trustees to be applied towards rebuilding.

We cannot see that the cases cited respecting the ademption

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of legacies have any application; for though the buildings were destroyed between the time of the execution of the will and the death of the testator, the land on which they stood continued to belong to him up to the time of his death, and vested in his trustees under the devise to them. There was therefore something remaining upon which the devise could operate; they took all the Charlotte street property which belonged to the testator at the time of his death, and the trust as to the use and occupation of the land would continue, though it necessarily became inoperative so far as related to the house and buildings, which had ceased to exist.

In authorizing his trustees to rebuild in case the buildings were destroyed by fire, the testator undoubtedly had reference to a fire that might occur after his death—after the property came into the possession of the trustees. Had the fire occurred after the property vested in them, probably there would have been no question as to their right to rebuild. Then, does the fact of the house having been burnt before the property vested in the trustees, render that clause of the will which authorizes the rebuilding, altogether inoperative? The intention of the testator clearly was that the house on the Charlotte street property, which he declares was in his occupation at the date of his will, and “any building which, in case of fire might be substituted in lieu of, or to replace the same,” should be a residence for his widow during her life: his trustees were to keep it in tenantable repair, and all repairs and all matters and things done in reference to it, were directed to be done with her consent and subject to her approval. To hold that the power to rebuild could not be exercised unless the buildings were destroyed after the testator’s death, though probably within the letter of the will, would defeat one of the chief objects of his bounty—the providing a residence for his widow during her life. In *Towers v. Wentworth*¹ it was said, that—

“Where the main purpose and intention of the testator are ascertained to the satisfaction of the Court, if particular expressions are found in the will, which are inconsistent with such intention, though not sufficient to control it, such expressions must be discarded or modified.”

The testator in this case has plainly declared that the house

¹ 11 Moo. P. C. 526.

which he occupied at the date of his will, or in case of its destruction, any house built in place of it, should be a residence for his widow during her life, and though he has not contemplated a destruction of the house during his own life, nor used language in his will strictly applicable to such a contingency, we think we should not be violating any principles of construction, by so moulding his language as to carry into effect, as far as possible, the general intention which he has so clearly declared.

We do not think the case is affected by the 19th section of the Wills Act, because the will clearly shews that the directions about rebuilding referred to the house in the testator's possession "at the date" of his will. The principle of the cases of *Cole v. Scott*¹ and *Castle v. Fox*,² therefore does not apply.

Considering then that the trustees are authorized to rebuild, the next question is, what description of house can they build? Must it be a house of the same description as to size and style of finish as the former house, or may they build a house of a different description? The testator has given them a very large discretionary power in this matter. After authorizing them to keep the house insured against loss by fire in about the sum which he himself had insured thereon, he directs that any moneys they may receive from any such insurance, shall be applied, in case of loss, to repairing the damages occasioned by the fire, "or in or towards erecting buildings of the like, or of a different character on the same site."

The order of the learned Judge on this branch of the case was, that the trustees were bound to rebuild the dwelling house and such other erections as were necessary for the comfortable enjoyment of the premises by the widow, of the character, dimensions and capacity, with such offices and appliances as were standing thereon before the fire, as near as might be, consulting the wishes and desires of the widow, and conforming thereto with regard to the dwelling house and appurtenances, and to such changes and alterations therein as she might desire for her personal comfort, so as there should be no material or substantial change therein in any respect to the injury of the inheritance, or otherwise.

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We do not see any objection to this order. It does not go beyond the powers given to the trustees by the will, "to erect buildings of the like, *or of a different character*" from those destroyed. If the law now prohibits the erection of wooden buildings, that is no reason why they should not build at all. They must erect such buildings as the law allows, and we think their powers under the will are sufficient to authorize them to do so.

The fact that the testator had received the insurance on the buildings during his life is no reason why the trustees should not rebuild. The will merely directs them to apply such fund towards repairing or rebuilding, but contains nothing that can be construed into a condition that the house should only be repaired or rebuilt in case the insurance money was available. Suppose the testator had allowed the insurance to run out, and the house had been burnt immediately after his death, before the trustees had an opportunity of ascertaining the state of the property, and of insuring, could it be successfully contended that they could neither repair or rebuild the house because one of the funds which the testator had pointed out as applicable to that purpose had ceased to be available? Or, if the house had come into the possession of the trustees, and they had neglected to insure, would their negligence deprive the widow of the benefit intended for her by the will? We think not. And therefore, if the trustees have the right to rebuild at all, under the altered circumstances of the property, we cannot see how the absence of the insurance money can be any obstacle to it.

With respect to the buildings in Queen's Ward, we think the trustees are authorized to rebuild them also. The clause of the will which directs the trustees to keep the buildings in tenantable repair and insured, is not confined to the buildings on the Charlotte street property, but in express terms, applies to "the rest" of the testator's real estate; and the authority to erect new buildings in lieu of those destroyed, refers to all his buildings. And there is a good reason why the powers should apply to the buildings in Queen's Ward, because that property, while the buildings were upon it, was the most valuable portion of the estate charged with the payment of the annuity; but, without the buildings would be almost valueless. In addition to this,

the testator himself had actually commenced to erect some new buildings on Prince William and Water streets, and had expended a very considerable sum of money upon them. The trustees were therefore entirely justified in completing those buildings, even if their powers did not extend further, of which we do not entertain any doubt.

It was also objected that the decree was wrong in directing that the money required for the erection of the new buildings might, if necessary, be raised by mortgaging some part of the real estate, other than that charged with the widow's annuity. No authority was cited on this point, nor, so far as I recollect, was any reason urged why the money might not be raised by mortgage.

The testator, after devising to his trustees, certain real estate which he charged with the payment of the annuity to his widow gave them all the rest and residue of his real estate, upon trust, after the expiration of a year from his death, and at such times thereafter as they should deem most advantageous, to sell the same, and to stand possessed of the proceeds upon the trusts, and subject to the directions thereafter declared concerning his residuary estate. And in the clause about repairing and rebuilding in case of damage or destruction by fire, he authorized his trustees, in case the insurance money should be insufficient for the purpose, to use and apply such portion of the capital of his residuary real and personal estate, not charged with the widow's annuity, as they should deem necessary.

Here is a distinct trust for the sale and conversion of the residuary estate, and an express authority to the trustees, in the event of buildings being burnt, to apply a necessary part of the residuary estate in rebuilding.

Though it has been said that a power to sell implies a power to mortgage, because a mortgage is a conditional sale—*Mills v. Banks*¹—later cases have determined that where property is devised subject to a charge, with a power of sale, the money may be raised by mortgage; but not so where the purpose of sale is for an object beyond raising a particular charge: *Stronghill v. Anstey*;² *Devaynes v. Robinson*.³ As a general rule, a mortgage is not a due execution of a trust for sale and conver-

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v.
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¹ 3 Fr. Wms. L.² 1 DeG. M. & G. 645.³ 24 Beav. 85.

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sion. The intention of the testator in this case was that his residuary estate should be absolutely sold and converted into money; and though we do not see why the appellant should object to this money being raised by mortgage, if the trustees have the right to rebuild, we cannot say that it would be a due execution of the trust; and therefore we think that part of the decree should be varied.

A further objection was, that the portion of the decree which authorized the trustees to insure any new buildings which they might erect in such sums as they thought necessary to protect the interest of the estate, was wrong; and that they should have been limited to the amounts insured by the testator on the respective buildings destroyed by the fire. The will directs that the trustees shall, during the life of the widow, keep the buildings on the Charlotte street property, and until the sale of the rest of his real estate, keep all the buildings insured against loss by fire, to about the amounts which he had then insured upon them. This direction only applies, in terms, to the buildings on the property at the date of the will; but we think there can be no doubt that the testator's intention was that not only those buildings, but any others which might be substituted for them, should be kept insured during the periods specified; and as he has given his trustees a discretionary power to erect buildings of a different character, we think it necessarily follows that they would be justified in increasing the amount of insurance, if the buildings which they erected were of greater value than those which were destroyed. It may be that, under the direction in the will, it would be no breach of duty on their part if they continued only the same amount of insurance on new buildings which had been upon the old ones; but we think they would be perfectly justified in increasing it, if the value of the buildings was increased. They were authorized "generally to manage" the real estate; and, as a part of that management, we think he intended them to insure, and not to limit them to the amount which he had insured on the former buildings.

The next question is, whether the annuity of \$5000 to the testator's widow is chargeable on the residuary estate in the event of the property specifically set apart for the payment of the annuity proving insufficient.

The testator, in the first place, devised to his trustees the lot of land fronting on Charlotte street, with a right of way to and from the same from King's Square, in common with the occupiers of a lot owned by him fronting on King's Square, in trust, for the use of his wife during her life. He then devised to his said trustees all his lands, &c., in Queen's Ward, lying between Prince William street and St. John street; and also bequeathed to them 160 shares of the stock of the Bank of New Brunswick, and £2000 of Saint John City debentures, upon trusts therein-after declared, and then proceeded as follows:—

"And I hereby charge the said last mentioned lands and premises in Queen's Ward aforesaid, and the said land, house and premises on King's Square; also the said one hundred and sixty shares of the capital stock of the Bank of New Brunswick, and the said £2000 in bonds or debentures of the Mayor, &c., of the City of Saint John, and the rents, dividends and annual income thereof, with an annuity or clear yearly sum of \$5000, to my wife Susan during her life, which annuity shall commence from my decease, and be paid quarterly, without deduction. And I direct that my said trustees shall stand seized and possessed of this said last mentioned real estate, stocks and bonds, and the annual rents, profits, dividends and interest thereof, upon trust, by and out of the said rents and profits, dividends and interest, to pay to my said wife the said annuity or clear yearly sum of \$5000 during her life, by even and equal quarterly payments in each year,—the first quarterly payment thereof to fall due and be payable at the expiration of three months from and after my decease; and as to the surplus of the said rents, profits, dividends and interests which shall remain in each year during the life of my said wife, after payment of the said annuity to her, I direct my said trustees to pay and apply said surplus in like manner as is directed as to the annual income of my residuary estate."

In cases of this kind, the true question is whether what is bequeathed is the income of a particular fund which is set apart, or an annual income of a certain amount. If the annuitant is really a legatee of the annuity, then the annuity must be paid in full out of the general residue, if the particular fund designated should prove insufficient; but if a fund was created by the testator, not for the purpose of paying the annuity, but for the purpose of giving the legatee a life interest in the fund, with remainder over, then all that the legatee can get is what the fund produces. One of the first cases in which this distinction was taken, is *May v. Bennett*; ¹ and the same rule was acted on in *Wright v. Callender*. ² So, in *Birch v. Sherratt*, ³

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¹ Russ. 370.]² 2 Q. G. M. & G. 652; 12 L. & Eq. 337.³ L. R. 2 Ch. 644.

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where a testator directed his trustees to convert and invest his property, and "with and out of the interest, dividends and annual proceeds thereof, to levy and raise the annual sum of £100," and pay it to his mother for life, "and from and after the payment of the said annual sum of £100, and subject thereto," he declared that the trustees should stand possessed of his said trust funds upon the trust thereafter mentioned; it was held, on the income of the trust property being insufficient to pay the annuity, that the deficiency must be paid out of the corpus: *Mason v. Robinson*¹ was decided on the same principle.

In *Gee v. Mahood*,² a testator directed his trustees to sell his real and personal estate, and to invest the proceeds, and set apart a sufficient amount of the investments to produce an annuity of £1200, which he bequeathed to his wife for her life, payable on the usual quarter days, and gave the residue of his estate, and also that part which was set apart for his wife, upon certain trusts for the benefit of his children after her death. The income of the trust estate was not sufficient to provide for the widow's annuity of £1200; and it was held by the Lord Justices, on appeal, that she was entitled to have the deficiency raised out of the corpus of the trust estate. The principle on which that case was decided was, that upon the construction of the will, the widow was to have an annuity of £1200 out of the estate, and not merely the income of the particular investment, limited to that sum. Cotton, L. J., said:—

"If there is a direct legacy of an annuity, then *prima facie* the annuitant is entitled to have that made good, not only out of the income but out of the capital, unless there are words sufficient to cut down the claim of the person to the income only."

And, in distinguishing the case from *Baker v. Baker*,³ he said:—

"The Court there held that this widow was tenant for life only of a particular fund, and that it was given after her death, as a fund intact, so that she could have no claim on the corpus of the fund of which she was a tenant for life. * * * That was a clear case of a tenant for life of a fund, the amount of which was to be ascertained by the annual income which it would produce, and was not the case of a gift to the widow of an annuity."

That case (*Gee v. Mahood*) was affirmed by the House of Lords on Appeal, under the name of *Carmichael v. Gee*,⁴ and

¹L. R. 8 Ch. D. 411. ²L. R. 11 Ch. D. 891. ³6 H. L. C. 616. ⁴L. R. 5 App. C. 588.

the principles on which *May v. Bennett* and *Wright v. Callendar* were decided, were approved.

Looking at the whole clause of the will, on which the question of the annuity in the present case arises, we think it shews a clear intention to give the widow an annuity of \$5000 absolutely, and not merely the income of the property vested in the trustees, which was only given for the purpose of securing the annuity, and not to restrict it, so as to make it payable exclusively out of that particular fund. The testator charges the property which he gives in trust to his executors, and the rents, dividends, interest and income thereof, "*with the payment of an annuity* or clear yearly sum of \$5000" to his wife during her life, which sum of \$5000 is to be paid quarterly, "*without deduction.*" Here is a clear gift of the annuity, charged upon the trust property, but the payment of it not restricted to the rents and income of that property; and if the clause had ended there, we think there would have been no doubt as to the construction. The doubt arises upon the subsequent words directing the trustees to pay the annuity "by and out of the said rents, dividends and interest." Taken by themselves, the construction of these words would seem to be that the widow could only look to the rents and interest of the trust property, and if that did not produce \$5000 per annum, she must submit to the deficiency. But this whole clause must be read together to give a construction to it, and so reading it, we think it imports that the annuity of \$5000 was to be paid at all events. The testator no doubt believed that the annual income and rents of the trust property would exceed the sum of \$5000, (and they did so when the will was executed, as was proved at the hearing,) for he directed that the surplus of the rents, dividends, &c., which should remain each year during the life of his wife "*after payment of the said annuity to her,*" should be applied in the manner directed as to the income of his residuary estate.

This case is distinguishable from *Baker v. Baker*,¹ because here the trust property after the death of the widow was not to go over intact to some person in remainder, but was to form

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¹ 16 H. L. C. 616.

1881. a part of the general residuary estate and be divided among
 the residuary legatees.

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We therefore think the words of the will admit of the construction, that the testator's intention was to give his widow an annuity of \$5000, and not merely the rents and interest to that extent of the property which he charged with the payment of it; and consequently, that any deficiency in such rents and interests to produce the annuity should be made up out of the other assets.

The next question is as to the division of the residue.

After giving a number of general and specific legacies, the will directs that the trustees shall convert the residuary personal estate not consisting of money invested in stocks, funds or securities yielding income, and at their discretion, either get in the moneys so invested, or allow them so to continue, and after paying the testator's debts and testamentary expenses and the several legacies, shall invest the surplus produce thereof pursuant to the general directions for investment hereinafter declared. Then, after directing how sales of the real estate shall be made, the will proceeds as follows:—

"And I direct that my said trustees shall stand possessed of the real estate charged with the said annuity [to the widow] subject thereto and of the proceeds thereof when sold, and of all the residuary estate, and of the proceeds thereof when sold, and the investments thereof, and the residue of my personal estate remaining after payment of my debts, funeral expenses and legacies, * * * * and the investment of said residue of my said personal estate, and also, after the decease of my said wife, of the said 160 shares of the capital stock of the Bank of New Brunswick, and the said £2000 in bonds of the Mayor, &c., of the City of Saint John, subject however to any deduction therefrom directed or authorized to be made by this my will, upon trust as to one-third part thereof, for my nephews John A. Wright, Charles H. Wright, Alexander Wright and Octavius Wright, share and share alike. * * * * And as to one-third part of such residuary estate as aforesaid, upon trust to pay unto my brother Nehemiah, the net interests, dividends and annual income thereof during his life, for his own absolute use and benefit, and after the decease of my said brother Nehemiah to pay the said one-third part to and among the children of my said brother Nehemiah, share and share alike. * * * * And as to one other equal third part thereof to pay the same to Jane Elizabeth, the wife of my late brother George, for her own absolute use and benefit forever." * * * *

If the appellant's construction of the will is correct, there

must necessarily be two divisions of the residuary estate; for it is clear that there can be no final division till after the widow's death, when the real estate, bank stock, &c., charged with the payment of her annuity, is directed to be sold and converted, and to form part of the residue. Again, the authority to the trustees to apply any portion of the capital of the residuary real and personal estate, not charged with the payment of the annuity, if they require it for the purpose of rebuilding, seems to be opposed to any intention to divide the residue till after the widow's death, because until that happens, it cannot be known what the residue will be: and this, we presume, is what is meant by the words, "subject however to any deduction therefrom, directed or authorized to be made by this my will," in the clause respecting the distribution of the residue. So also, the taxes and assessments on the Charlotte street property, are directed, to be paid out of the income of the residuary real and personal estate in certain specified securities—mortgages, bank stocks, &c. These provisions seem to shew that the testator did not intend that there should be an immediate distribution of his residuary estate, else, where was the necessity of investing it? He seems to have had in his mind that there would, or at all events, might be, a portion of time between the receipt of the funds by his trustees, and their distribution of them among the residuary legatees, when they ought not only to be kept from the risk of loss, but also earning interest, and therefore he directed them to be invested.

Though there may be some difficulty in carrying out the direction to pay the annual income of one-third of the residue to the testator's brother Nehemiah, if the distribution does not take place till after the widow's death, we think the general intention to be gathered from the whole will is, that the distribution was not to take place till that time.

It appears however by the judgment of the learned Judge, that all parties interested in the residuary estate, assented that a decree should be made directing the trustees to pay the net annual income of it to the residuary legatees; and a decree was made accordingly, (Decretal Order, page 8, paragraph No. 8). In our opinion there is no authority given by the will to pay over the income of any portion of the residuary estate to the

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1881. Messrs. Wright, or to Mrs. Jane Merritt during the widow's
lifetime ; but that the dividends and interest should accumulate
MERRITT and form part of the residue. As the decree on this point was
" made with the assent of the appellant, she must be bound by it.
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Being of opinion that the trustees were not authorized to divide the residuary estate during the life of the widow, we think the residuary legatees had no right to claim a division on giving security for the payment of the widow's annuity. The cases, so far as we are aware, where legacies have been ordered to be paid on security being given to the executors against contingent debts, have all been where the legacy was due and payable. Here, according to our construction of the will, these residuary legacies are not yet payable.

Another question before the learned Judge, appears to have been, whether the corpus of the residuary estate, or any portion of it, could be divided, and paid over to the legatees during the life of the widow, with the assent and approval of all the legatees whose interests might be affected ; and the learned Judge was of opinion that such an arrangement might be made, and a conditional decree (Decretal Order, paragraph 9,) was made to that effect ; being however, only permissive as regards the trustees. On the main question—whether the residuary estate was divisible during the life of the widow—the learned Judge—rightly, we think, decided in the negative.

The only remaining question is, whether the learned Judge was right in imposing as a condition to allowing the defendant Jane Elizabeth Merritt, the costs of her answer, that she should withdraw her opposition to Mr. Irvin, the executor in New York, paying over to the executors in this Province, the funds in New York, belonging to the estate.

As a general rule, costs in equity, are in the discretion of the Court, which is frequently influenced in giving or refusing them, by the conduct of the parties. The learned Judge's opinion was that the conduct of Mrs. Jane Merritt in the matter, was unwarrantable, and therefore he imposed the condition on which he would allow her costs.

There was nothing to shew that Mrs. Jane Merritt's rights under the will, would be in any way prejudiced by Mr. Irvin handing over the funds under his control to the executors here ;

nor that Mr. Irvin was prevented from handing them over by the notice which Mrs. Merritt served upon him. On the contrary, it appears that in August 1878, he told Mr. Holden, one of the executors in this Province, that by the law of the United States he was prevented from parting with any of the estate until the expiration of eighteen months after the proving of the will in New York. If this is the law in the United States, and there was nothing proved to the contrary), Mrs. Merritt's notice had done no injury to the estate, nor impeded the settlement of it, up to the time of making the decree, for the eighteen months had not then expired; therefore the learned Judge's remark about her conduct, was perhaps, scarcely deserved. However, as the eighteen months have now expired, and so far as appears, there is no reason why Mr. Irvin should continue to hold the property any longer, we think the direction as to the costs is not a ground of appeal, even though we might not, perhaps, have come to the same conclusion.

We think that part of the decree which authorizes the trustees to raise money by mortgage should be varied, and the rest of the decree affirmed. We also think this is a case in which the costs of the respective parties should be paid out of the estate.

Judgment accordingly.

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McCARTHY, ADMINISTRATRIX OF McCARTHY,

v.

THE PROVIDENCE WASHINGTON INSURANCE CO.

1881.

April.

[Full Court, before WELDON, WETMORE, and PALMER JJ.]

*Costs of the day—Affidavit not disclosing that cause was at issue—
Where cause had been noticed for trial and entered at the circuit
—Court will presume cause was at issue.*

The plaintiff gave notice of trial and entered the cause on the docket at the circuit. An application to set aside a rule for costs of the day for not proceeding to trial was made on the ground that the affidavit on which the rule for costs was obtained did not shew that the cause was at issue.

Held, that as against the plaintiff the Court must presume that the cause was at issue.

On a former day in term, *Weldon, Q. C.*, obtained a rule *nisi* for defendant company to shew cause why a rule for costs of the day for not proceeding to trial should not be set aside on

1881. the ground that the affidavit upon which the rule for costs of
 McCARTHY the day was obtained did not shew that the cause was at issue.
 v. April 29, 1881. C. A. Palmer shewed cause, and H. H.
 THE PROVID- McLean was heard in support of the rule.
 ENCE WASH-
 INGTON
 INSUR. CO. *Per Curiam.* We must presume that the cause was at issue,
 the plaintiff having noticed it for trial, and entered on the
 docket.

Rule dismissed with costs.

EASTER TERM—44 VICTORIA.

GENERAL RULES IN EQUITY.

1. IT IS ORDERED, That where leave is given to introduce facts and circumstances into a Bill filed, by way of amendment, or, where the plaintiff has liberty to state such circumstances on the Record, pursuant to the provisions of the 56th section of chapter 49 of The Consolidated Statutes, such amendment or statement shall be made by filing with the clerk a printed or written statement thereof, to be annexed to the bill; and such proceedings by way of answer, evidence, or otherwise, shall be had and taken thereon, as if the same were embodied in a Supplemental Bill: provided that the Judge may make such order for accelerating the proceedings as may be agreeable to justice.

2. Whenever a Judge receives notice of Appeal under the 61st section of chapter 49 of The Consolidated Statutes, he shall on the application of either party, order that the same be set down for hearing at the Term of the Supreme Court next after such application, and the Clerk shall thereupon enter the same upon the proper Paper, and the same shall be heard when reached; and if not then prosecuted, such Appeal shall be dismissed with costs, unless the Court shall, upon good cause shewn, postpone the hearing of such Appeal.

JOHN C. ALLEN,
 J. W. WELDON,
 A. R. WETMORE,
 CHARLES DUFF,
 A. L. PALMER.

BARRISTERS' SOCIETY OF NEW BRUNSWICK.

At a Meeting of the Barristers' Society held in Easter Term 1881, the 19th and 21st sections of the Bye Laws of the Barristers' Society, passed on the 8th day of February, 1867, were repealed, and the following Bye Laws were passed and substituted in lieu thereof, viz:—

19. Before any person is presented to the Barristers' Society for the purpose of being examined, in order to his being entered as a Student in the office of any Barrister, he shall give a Term's previous notice in writing, put up in the Library Room, on or before the first Friday of Trinity Term, and shall present a Petition to the Council of the said Society, setting forth his age, place of birth, residence, place of education, the branches in which he is prepared to undergo an examination, and the name of the Barrister with whom he proposes to study, which petition shall be subscribed by the applicant, and certified by such Barrister; after a careful enquiry and personal examination as to the character, habits and education of the applicant, and that upon such enquiry and examination the Barrister verily believes the applicant to be a proper person and properly qualified to be admitted as a Student at Law, and upon his being approved by the Council, he shall be fully examined at Fredericton, which examination shall only take place annually in Michaelmas Term, at such time in Term as may be appointed, and by written questions and answers, or orally in such branches as two Members of the Council, one at least being an examiner, may determine. No person applying, being a graduate of any chartered College, will be required to undergo an examination.

21. Any Student who shall hereafter enter and be admitted a Student at Law, may make application for admission as an Attorney in Michaelmas Term only, and shall give a Term's notice in writing on or before the first Friday of Trinity Term of his intention to apply for admission, and shall undergo an examination at such time and place as the Council or any three Members thereof, two being examiners, may appoint, which examination shall be either by written questions or orally, or both, at the discretion of the examiners. If by written questions, the answers to such questions shall be in writing, and shall be written in a legible hand in the presence of one of the Council or examiners, or such other person as the Council may for that purpose appoint. No applicant shall be permitted to refer to any book or person, or other source of information, to assist him in such answers. The written papers shall be marked or designated by letters or numbers only, when there is more than one applicant, and shall be submitted to the examiners for inspection and approval, and if satisfactory, the examiners shall certify their approval thereupon; and without such certificate no applicant shall be deemed qualified for admission.

In the case of Students who have already entered, the applications for admission and examination shall be received and held semi-annually only, viz : in Easter and Michaelmas Terms ; the Term's notice and other provisions above contained shall apply to such applicants ; provided however, that in the cases of Students already entered, whose terms of study shall expire either in Hilary or Trinity Term, such Students may, if they wish, be examined at the previous Term, and if such examination be found satisfactory, and they are in other respects entitled, may be admitted at the expiration of their term of study.

In cases where a Student has, during his term of study, been engaged in any other occupation or employment, he shall state in his Petition for admission particularly what the occupation or employment was, and how long he was engaged in it, and his Petition shall be accompanied by a certificate from the Barrister with whom he studied, distinctly verifying the statement, and declaring that the Student had engaged and continued in such occupation or employment during the time stated, and received the salary or remuneration (as the case may be) with his express knowledge and consent.

The foregoing amendments and additions to the Bye Laws and Regulations of the Barristers' Society of New Brunswick, having been submitted to the Judges of the Supreme Court for approval and sanction, it was ordered that the same be approved and sanctioned.

30th April, 1881.

JOHN C. ALLEN,
J. W. WELDON,
A. R. WETMORE,
CHARLES DUFF,
A. L. PALMER,
G. E. KING.

CASES DETERMINED
BY THE
SUPREME COURT OF NEW BRUNSWICK
IN
TRINITY TERM, XLIV. VICTORIA.

OTTY AND OTHERS APPELLANTS,
v.
CROOKSHANK AND OTHERS RESPONDENTS.

1881.

June.

(Equity Appeal.)

Wills—Construction of—Word “Heirs”—Construed same as “Children” or “Issue;” where such was clear intention of testator.

Wills ought to be so interpreted as not to defeat the intention of the testator by technical rules of construction; but by considering the language in a free, liberal and common sense spirit, to give effect to the manifest intention.

Therefore the word “heirs” was construed as a word of substitution, and held to have the same effect as the word “children,” or “issue,” such being the manifest intention of the testator.

Appeal from the decision of the Judge in Equity. The following are the material facts.

Elizabeth Crookshank, of the City of Saint John, widow, died in A. D. 1847, having first made the following will:—

“In the name of God, Amen.

I, Elizabeth Crookshank of the City of Saint John and Province of New Brunswick, widow, being of sound mind, memory and understanding, but advanced in years and impressed with the uncertainty of life, do make and declare this my last will and testament (hereby revoking all former wills and testaments by me at any time heretofore made and executed) in manner and form following, that is to say:

First: I desire that my body may be decently interred and all my just debts and funeral and testamentary expenses paid, and all debts due to me collected as early as conveniently may be.

Secondly: I give, devise and bequeath all and singular the messuage dwelling house, land and premises lying on the eastern side of Prince William Street, now in my occupation and whereon I now reside, unto my friends John V. Thurgar of the said city, merchant, Isaac L. Bedell of the same place, merchant, and James William Boyd of the same place, barrister at law, who are also hereinafter named executors of this my last will and testament, and to the survivors and survivor of them and to the heirs of such survivor in trust for the use and benefit of my son Robert W. Crookshank, junior, and Hahnah his wife, and the survivor of them during the term of their natural

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lives and of the life of the survivor of them, and after the death of such survivor I will and direct that the said property be fairly appraised and valued by my executors and conveyed to Thomas Otty Crookshank, his heirs and assigns upon his securing by good and sufficient securities to my said executors and the survivors and survivor of them and the executors and administrators of such survivor one equal fifth part of the said appraised value with interest in trust for his sister Elizabeth Irons Crookshank, one other equal fifth part of the said appraised value with interest in trust for his sister Mary Wood, one other equal fifth part with interest in trust for his sister Harriet Augusta, and one other equal fifth part with interest in trust for his sister Emma McGill, the interest of the said several sums so to be secured to be paid annually and applied towards the support and education of the said legatees respectively from the time of the death of their surviving parent until their respectively coming of age, and their respective legacies then to be paid to them: And in case of the said Thomas Otty Crookshank being dead at the time of the death of his surviving parent or refusing or omitting to give the requisite securities for the purpose aforesaid then the said property to be sold and disposed of and the sum of one hundred pounds paid to the said Elizabeth Irons Crookshank, and the residue of the net proceeds equally divided for the benefit of the said several children of the said Robert W. Crookshank, junior, and their said several shares paid to them on their respectively coming of age, and in the meantime to be placed at interest payable annually, and the interest of each applied to the benefit of the said children respectively. *And in the event of any or either of them the said children dying in the life time of either of their parents or before attaining the age of twenty-one years then the share of such child to go to his or her lawful heirs.* * * *

The bill alleged (*inter alia*) the following facts which were admitted:

The said Mary Wood, Harriet Augusta, and Emma McG., daughters of Robert W. Crookshank, junior, and Hannah his wife, in the second paragraph of the said will mentioned, were living at the time of the making of the said will, and each of the said children departed this life after the making of the said will and before the death of the said testatrix, and before the attaining the age of twenty one years.

The said Robert W. Crookshank, junior, and Hannah his wife had no other children than those named in the second paragraph of said will, namely: the said Thomas Otty Crookshank, and Elizabeth Irons Crookshank, and the said Mary Wood Crookshank, Harriet Augusta Crookshank, and Emma McGill Crookshank, the last three of whom died in the lifetime of the testatrix, as above mentioned

Elizabeth Irons Crookshank intermarried with the defendant Robert W. Crookshank.

The testatrix, Elizabeth Crookshank, died seized of the dwelling house, land and premises lying on the eastern side of Prince William Street, mentioned in the second paragraph of the will.

The said Robert W. Crookshank, junior, son of the said testatrix

and his wife Hannah, survived the testatrix, and afterwards died, leaving his wife Hannah him surviving. The latter departed this life on or about the twenty-ninth day of April, A. D. 1878.

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The said Allen Otty and his wife Elizabeth survived the testatrix, and the said Elizabeth Otty, departed this life on or about the seventh day of August, A. D. 1852, leaving her husband the said Allen Otty her surviving. The testatrix had no other children than the said Elizabeth Otty and the said Robert W. Crookshank.

The said Allen Otty and Elizabeth Otty his wife had ten children, namely, the defendants George Otty, Allen C. Otty, John McG. Otty, Robert W. Otty, William Otty, Catherine McG., now the wife of the defendant Sylvester Z. Earle, Henry P. Otty, and also Andrew C. Otty, Thomas John Otty, and Elizabeth C. Otty, the last three of whom are now deceased, but all of whom were living at the decease of testatrix.

The said Thomas John Otty departed this life on or about the twentieth day of December A. D. 1847, unmarried and intestate.

The said Andrew C. Otty, departed this life on the twenty-fifth day of June A. D. 1875, unmarried and intestate. Administration of his estate and effects was on the third day of July A. D. 1875, granted to the said George Otty and Henry P. Otty.

The said Elizabeth C. Otty departed this life on the twentieth day of March, A. D. 1874, unmarried and intestate. All the children of the said Allen Otty and Elizabeth his wife respectively attained the age of twenty-one years,

No sale has been made of the said Prince William Street property, and that disputes and difficulties have arisen between the parties to this suit in reference to the same, the said defendants George Otty, Allen C. Otty, John McG. Otty, Robert W. Otty, William Otty, Sylvester Z. Earle and Catherine McG. his wife, and Henry P. Otty claimed that the one equal fifth part of the value of the property mentioned in the second paragraph of the said will in said paragraph mentioned to be held in trust for Mary Wood Crookshank, the said one other fifth part mentioned to be held in trust for Harriet Augusta Crookshank, and the said one other fifth part in said Will mentioned to be held in trust for Emma McGill Crookshank, have lapsed by the decease of the said Mary Wood Crookshank, Harriet Augusta Crookshank, and Emma McGill Crookshank respectively in the lifetime of the said testatrix, and they also claimed that they the said George Otty, Allen C. Otty, John McG. Otty, Robert W. Otty, William Otty, Sylvester Z. Earle and Catherine McG. his wife, and Henry P. Otty, were as children or next of kin of the said Elizabeth Otty entitled to receive the three equal fifth parts of the said property mentioned in the second paragraph of the said will, they claiming that the said property ought to be considered as personal estate and as such personal estate it would fall into and become part of the residuary personal estate by the tenth paragraph of the said will directed to be equally divided among the children of the said Elizabeth Otty and the defendants T. Otty Crookshank and Robert W. Crookshank and Elizabeth

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Irons his wife, claim that they were entitled to the whole of the Prince William Street property or the proceeds thereof when sold.

The plaintiff was desirous of having the direction of this Honorable Court as to the rights and interest of the parties in and to the said property on the eastern side of Prince William Street, mentioned in the second paragraph of the said will, and as to the proper course to be taken in reference to the same, and the plaintiff therefore prayed that it might be declared,

1st. Whether the said defendants Thomas Otty Crookshank and Robert W. Crookshank and Elizabeth Irons his wife, are or are not entitled to the whole of the said property situate on the eastern side of Prince William Street in the second paragraph of the said will mentioned, or to the whole proceeds thereof when sold as claimed by them.

2d. Whether the said defendants George Otty, Allen C. Otty, John McG. Otty, Robert W. Otty, William Otty, Sylvester Z. Earle and Catherine McG. his wife, and Henry P. Otty are entitled to three equal fifth-parts of the said property on Prince William Street or three-fifths of the proceeds thereof when sold as claimed by them, or to any other and what part or share of the said property or of the proceeds thereof when sold.

The judgment of the Judge in Equity was as follows:

The sole question in this case is, who is entitled to the property, mentioned in the second section of the will mentioned in the Bill, after the death of Robert W. Crookshank and Hannah his wife, under the state of facts set out in the Bill.

The Otty family contend that the devise or legacy to children of Robert W. Crookshank that died during the life of the testatrix lapsed, and with reference to that there was an intestacy and the Otty family are entitled to one half of it.

The Crookshanks contend that they are entitled to it under the words in the latter part of the clause "and in the event of any or either of the *said children* dying in the lifetime of either of their parents or before attaining the age of twenty-one years then the share of such children to go to his or her lawful heirs."

And I think the Crookshanks' contention is correct. The very event provided for by the clause has happened, three of the children have died, in the lifetime of their parents, for such dying having taken place in the lifetime of the testator does not make it less in the lifetime of their parents. Then this having happened if I am to give any effect at all to this clause in the will, I must declare that the share of such children or child is to go to his or her lawful heirs, and these heirs are unquestionably Thomas Otty Crookshank and Elizabeth Irons Crookshank. It was contended before me that these words "the lawful heirs of such child or children" were words of limitation to shew the extent of the estate of such children in case the devise vested, but it is quite clear to my mind that they can have no such meaning, for this clause takes no effect at all with reference to any share that vest in any such children, it applies solely to a share that

would otherwise lapse by reason of the death of the devisee before he would take, and the sole use of this clause is to make a devise over in the case indicated, and therefore these words must I think operate as words of purchase and not of limitation, and are a clear devise of the property in question to the heirs or next of kin of those children who are Thomas O. Crookshank and Elizabeth Irons Crookshank.

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The Otty family also contend that the share of these children is devised to them under the tenth clause in the will, but independent of the fact that I have before pointed out, that it is disposed of to the Crookshanks by the said clause, and could in no case form part of the residue, I think it manifest that the testatrix never could have intended it to form part of what she in that section calls "the rest and residue" of her personal estate, for that residue was to be placed at interest immediately after her death, and it is impossible that she could have intended the property in dispute to be so dealt with, and it was not personal estate at all and never could have been such until the death of the life tenants, and then only in case Thomas Otty Crookshank failed to give the security mentioned in that section.

I therefore think that if there had been an intestacy as to this property, it could not have been included in the bequest mentioned in this section.

Declare that such property belongs to Thomas Otty Crookshank and Elizabeth Irons Crookshank.

A decree in conformity with the above judgment was drawn up, and from this the defendants, George Otty, Allen C. Otty, John McG. Otty, Robert W. Otty, William Otty, Sylvester Z. Earle, and Catherine McG. his wife and Henry P. Otty, and the said George Otty and Henry P. Otty as administrators of the estate of Andrew C. Otty, deceased, appealed.

June 22, 1880. *Weldon, Q. C.* in support of the appeal.

This case turns principally on the construction of the tenth paragraph of the will. *Quoad* the heirs of their children the Prince William Street premises would be personal property.

The executors were to hold £1000 for each child, but not until the death of Robert W. Crookshank and Hannah his wife; and when T. Otty Crookshank made his election as mentioned in the 2nd section of the will; or if he did not elect, then the executors were to sell and hold in like manner. They took no beneficial interest until these events happened.

This will was made before our Wills Act, 1 Vic., (1838).

The rule is that it is the intention of the testator to divide the property among living legatees unless the contrary is perfectly clear. Per Vice-Chancellor Woods, in *In re Porter's*

1881. trusts.¹ He referred to *Doo v. Brabant*;² *Bone v. Cook*;³
 OTTY *Corbyn v. French*;⁴ *Tidwell v. Ariel*;⁵ 2 Jarm. Wills, p. 719;
 v. *Thompson v. Whitelock*;⁶ *Ryder v. Wager*;⁷ *Bolitho v. Hillyar*.⁸
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S. R. Thomson, Q. C., for the respondents, Robert W. Crookshank and wife. There is no ground for disturbing the judgment. This is not a legacy to "A and his heirs," where in case of A. dying in the lifetime of the testator it will lapse; but here it is expressly provided that in the event of any of the children dying in the life of either of their parents or before attaining the age of twenty-one years then the share of such a child to go to his or her lawful heirs. This event has happened, and I see no reason why the Court should be astute to defeat the clear intention of the testator. Theob. on Wills, p. 345.

"A substitutional gift must be distinguished from an absolute gift to A. for life and remainder to his children." *Ive v. King*⁹ is decisive of this case. See also *In re Speakman*.¹⁰ 2 Redf. Wills 62.

Sturdee, for the respondent, T. Otty Crookshank. Even if the legacies lapsed, they would not pass under the residuary clause, but there would be an intestacy as to them, and they would go to the next of kin. See *Smith v. Butcher*;¹¹ *Willing v. Baine*;¹² *Walker v. Muir*;¹³ *Hannam v. Sims*;¹⁴ *In re Sibley's Trusts*.¹⁵

Weldon, Q. C., in reply. The construction of the whole will shews they were not to take as a class, but as individuals; and the words are words of purchase. The legacies lapsed and would fall into the residue, and go to the children of Mrs. Otty.

Suppose the tenants for life died in the lifetime of the testatrix, and one of the children had attained twenty-one, and died, that would not prevent the legacies lapsing. This was not a gift over.

Cur. adv. vult.

ALLEN, C. J., now delivered the judgment of himself and WELDON and DUFF, JJ.:—

The question in this case arises under the will of Elizabeth Crookshank, who died in 1847, and by her will, dated in 1835,

¹ 27 L. J. Chan. 196, 198.

² 4 T. R. 706.

³ McClel. Rep. 168.

⁴ Vesey, 418.

⁵ 3 Mad. 408.

⁶ 4 DeG. & J. 490, 496.

⁷ 2 P. Wms. 328.

⁸ 34 Beav. 180.

⁹ 16 Beav. 46, 52.

¹⁰ 4 Ch. Div. 620.

¹¹ L. R. 10 Ch. D. 113.

¹² 8 P. Wms. 113.

¹³ 1 J. & W. 1.

¹⁴ 2 DeG. & Jones, 151.

¹⁵ L. R. 5 Chan. Div. 494.

devised a house and lot of land in St. John, to her executors in trust, for the use and benefit of her son Robert W. Crookshank, jr., and his wife, and the survivor of them for life; and after the death of the survivor, the property to be appraised and valued by her executors, and conveyed to Thomas Otty Crookshank, the son of Robert W. Crookshank, jr., upon his giving security to the executors for the payment of one-fifth of such appraised value to each of the four daughters of Robert W. Crookshank, jr., viz.: Elizabeth Irons, Mary Wood, Harriet Augusta, and Emma McGill, with interest annually, during their respective minorities, to be applied towards their support and education, and to pay the principal on their coming of age. And in case the said Thomas Otty Crookshank should neglect or refuse to give such security, the property was to be sold, and £100 of the proceeds paid to Elizabeth Irons, and the residue to be equally divided for the benefit of the said several children of the said Robert W. Crookshank, jr., and their said several shares paid to them on their coming of age, and in the meantime to be placed at interest, to be applied to the benefit of the said children respectively. "And in the event of any or either of the said children dying in the lifetime of either of their parents, or before attaining the age of twenty-one years, then the share of such child to go to his or her lawful heirs."

After making other devises and bequests, the testatrix, bequeathed to her executors all the residue of her personal estate in trust, to be placed at interest for the use of her daughter Elizabeth Otty, during her life, and after her death, the said residue to be equally divided among her children.

Three of the daughters of Robert W. Crookshank, jr., viz.: Mary, Harriet, and Emma, died under age, during the lifetime of the testatrix. Robert W. Crookshank, jr., and his wife both survived the testatrix, and have since died.

The question is whether Thos. Otty Crookshank and Elizabeth Irons Crookshank, the surviving children of R. W. Crookshank, jr., are entitled to the whole of the proceeds of the land devised to the executors in trust, or whether the shares intended for the three deceased daughters lapsed by their deaths in the testatrix's lifetime, and formed part of her residuary estate, and

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vested in the children of Elizabeth Otty under the residuary clause of the will.

Unless the last clause in the devise to the children of R. W. Crookshank, jr., prevents it, the shares of the three daughters who died in the testatrix's lifetime would lapse, and either form part of the residuary estate, or there would be an intestacy *pro tanto*. But we think the testatrix has shewn a clear intention to substitute the survivors in the event of the gift to either of the children of R. W. Crookshank, jr., failing by lapse.

The question as to the right of the surviving children seems to be perfectly clear, both upon principle and authority. Nobody can doubt that such a construction of the will would be entirely in accordance with the intention of the testatrix; and it is our duty to give effect to that intention, unless by doing so, we violate some rule of law. Wills ought to be so interpreted as not to defeat the intention of the testator by technical rules of construction; but by considering the language in a free, liberal and common sense spirit, to give effect to the manifest intention: *Habergham v. Ridehalgh*.¹ We think there are no technical rules of construction to prevent the intention of the testatrix being carried out in this case. Then as to authority: in the case, *In re Porter's Trust*,² the words of the bequest were, "I give to my brother Samuel Porter, or his heirs £1000." Samuel Porter died in the lifetime of the testatrix, leaving a widow and child; and it was held that the legacy did not lapse, but went by substitution to the widow and child, as the legal representatives under the Statute of Distributions. Sir W. P. Wood, V. C., said, "The principle on which the decision in all these cases must proceed is very clear, and has been well laid down in *Bone v. Cook*,³ decided by C. B. Alexander, where there is a gift to a legatee by name, with a clause of substitution in the event of his decease, the gift will take effect whether the legatee named in the first instance die in the lifetime of the testator or not." The rule laid down in that case is decisive upon the construction of the will now under consideration.

In order to carry out the apparent intentions of the testator, the doctrine of substitution has been applied to cases where the original legatee was dead at the date of the will.

¹ L. R. 9 Eq. 396.

² 4 K. & J. 138; 4 Jur. N. S. 20.

³ 3 M. & C. 168.

See *In re Potter's Trust*; ¹ *Adams v. Adams*; ² *In re Sibly's Trusts*.³

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We cannot see any reason why the word "heirs" in this case should not be construed as a word of substitution, and have the same effect as the words "children" or "issue." The simple question is, what did the testatrix intend when she declared that in the event of either of her grandchildren—the children of her son Robert—dying in the lifetime of their parents, or under age, the share of such child should go to his or her lawful heirs? We think she intended that the share of any grandchild so dying should vest in the person who, by law, would be entitled to the property—it might be a lineal or a collateral heir, according to circumstances, or possibly it might be the persons who would be entitled to the personal estate under the Statute of Distributions. See *In re Porter's Trust*, (*supra*). Or, according to *Smith v. Butcher*,⁴ the persons who would succeed to the real estate. These questions are of no importance in this case, because under any circumstances, either as the heirs or next of kin of their deceased sisters, the survivors, Thomas Otty and Elizabeth Irons Crookshank, would be entitled to the shares of the property which their sisters would have taken if they had survived their parents.

We think the appeal should be dismissed with costs.

WETMORE, J., stated that he had not looked into the case as thoroughly as he would like, and although he did not dissent, he expressed no opinion.

KING, J., took no part, not having heard the argument.

Appeal dismissed with costs.

¹ L. R. 8 Eq. 52.² L. R. 14 Eq. 246.³ L. R. 5 Ch. D. 494.⁴ L. R. 10 Ch. D. 113.

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REGINA v. WILSON AND OTHERS, ASSESSORS, &c.

June.

Assessment—St. John—Trustees of estate residing out of the city, but employing agents there to collect and pay moneys.

S., being a resident of St. John, died, leaving property consisting of mortgages, Bank Stock, Debentures, &c., and appointed trustees, none of whom resided in St. John, although some of them carried on their private business there. The trustees employed T., who held the office of Pilot Commissioner in St. John, and also attended to some other business on his own account, to collect the dividends and interest on the securities and to make payments of the moneys so collected. T. kept the accounts in his office, where some of the trustees came occasionally to make inquiries and give directions in matters connected with the estate; but they kept no office, and did no business as trustees, except what he did as their agent in so collecting and paying the moneys.

Held, that the trustees neither "carried on business," nor had "an office or place of business" in St. John, and were not liable to assessment.

Oct. 13th, 1880. *Tuck, Q. C.*, shewed cause against a rule *nisi* to quash an assessment on James D. Lewin and others, trustees of Benj. Smith's estate.

The question of merits is not decided by the previous judgment, and the point now to be determined is, whether the trustees are liable to be assessed. The applicants were the executors and trustees under the will of Benj. Smith. The property which they held, consisted of mortgages on real estate, bank stock, provincial debentures, St. John corporation bonds, bonds of incorporated companies and societies, and a bond given to secure a private debt. As executors and trustees, they collected the interest and dividends payable upon these securities, and paid the amount over to the annuitants and beneficiaries under the will, none of whom resided in the province. The trustees were not in possession of any of the mortgaged lands, and it was admitted that neither of them resided in the city of St. John at the time the assessment was made, although some of them did business in the city.

James U. Thomas, who held the office of Pilot Commissioner in St. John, and also attended to some other business on his own account, was employed by the trustees to collect the dividends and interests payable on the securities held by the estate of Benj. Smith, and to make payments of the moneys so collected; that he did collect and pay out such moneys from time to time, and kept the accounts thereof in his office, where some of the trustees came occasionally to make inquiries, and give

directions in matters connected with the estate, but they kept no office, and did no business as trustees, except what he did as their agent in so collecting and paying the moneys.

Mr. Tuck referred to the St. John Assessment Act of 1859, and contended that whatever applied to a living person applies equally to estates of deceased persons. If an estate had an office in the city, it was liable to be assessed, as doing business there. It made these trustees inhabitants for the purposes of taxation: See Act of 1871, p. 107, 34 Vic., c. 18. This estate clearly did business in St. John. [DUFF, J. Is not the argument this, that the property really belongs to the *cestui que trusts*, and when the money is sent to them it is liable to taxation where they live?] If it is, that can make no difference, because the question is—what are they liable to pay here, under the law?

Again, he urged, several of these trustees had their places of business in St. John, and were inhabitants for the purpose of taxation, and this property, mortgages and bonds, stood in their names.

Weldon, Q. C., in support of the rule.

If the contention of the other side is correct, any non-resident employing a person to collect money in St. John would be liable to taxation as an inhabitant. By the 12th sec. of the Act of 1859, a person residing in St. John is liable to be assessed on personal property wherever the same may be, and it follows that, if the contention of the other side is correct, these trustees are liable to be assessed in St. John, on all their personal property, whether in the city or not. The Act of 1876, (39 Vic., c. 29,) shews that the Legislature adopted the construction of the 12th section, which I have stated.

In the matter of Mr. Kenny, of Halifax, the Supreme Court of Canada held he was not liable to taxation on ships registered outside of Halifax, under the peculiar wording of the Halifax Assessment Act.

These trustees simply stand in a representative capacity, and their position is distinct from their position as individuals. The trustees are not in possession. If the contention of the other side is correct any person who employs an attorney to collect interest is liable to be taxed. [ALLEN, C. J. What

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1881. would you say if one of the trustees himself collected the interest and did the business?] It would not make them liable. By carrying on business is meant something more than this. It has been held that receiving a government salary is not a carrying on of business. Having an office or place of business means the place of carrying on an occupation.

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Kaye, Q. C., on the same side.

These Acts should be construed reasonably, with reference to the objects sought to be attained. It plainly appears that the estate of Mr. Smith consists solely of choses in action. [WETMORE, J. It could be taken in execution.] [WELDON, J. Mr. Smith lived in St. John, had his property there, and died there, his trustees continued on his estate there; does not that make a difference between this and the extreme case put by Mr. Weldon?] Carrying on business means carrying on a calling. "Carrying on" refers to the whole. The trustees, who do business in St. John, are only made inhabitants in respect of property in their own right. The case of a person carrying on business by his agent is provided for by the Act, but then it is not the bulk of the property that is taxed, but the increase or profits of the business.

Cur. adv. vult.

The judgment of the Court (ALLEN, C. J., and WELDON, WETMORE, DUFF, and KING, JJ.) was now delivered by

ALLEN, C. J. The applicants for the *certiorari* in this case are the executors and trustees under the will of Benj. Smith, deceased. The only property which they held consisted of mortgages on real estate, bank stock, provincial debentures, St. John corporation bonds, bonds of incorporated companies and societies, and a bond given to secure a private debt. As executors and trustees they collected the interest and dividends payable upon these securities, and paid the amount over to the annuitants and beneficiaries under the will—none of whom resided in the Province. The trustees were not in possession of any of the mortgaged lands; and it is admitted that neither of them resided in the city of St. John at the time the assessment was made; they were therefore not liable to be assessed as "inhabitants" of the city, under the 12th section of "The St. John City Assessment Act of 1859," (22 Vic., c. 37,) unless

they were made inhabitants constructively, by the Act 31 Vic., c. 36, which declares that for the purposes of assessment under that Act, "any person carrying on any business, or having any office or place of business, or any occupation, employment, or profession within the city of St. John, shall be deemed to be an inhabitant thereof."

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Under the Act of 1859, an inhabitant of the city was liable to be taxed on his personal estate wherever it might be; and also, upon the income or emolument which he derived from "any office, place, occupation, profession, or employment within the Province." But this provision did not apply to persons who carried on their business in St. John, and had their residences elsewhere—beyond the city limits—and therefore, no doubt to provide for such cases, the Act was amended by the 31st Vic., c. 36, above referred to.

The facts relied on to bring the assessment now in question within the provisions of that section are, that one J. U. Thomas, who held the office of Pilot Commissioner in St. John, and also attended to some other business on his own account, was employed by the trustees to collect the dividends and interest payable on the securities held by the estate of the late Benj. Smith, and to make payments of the moneys so collected; that he did collect and pay out such moneys from time to time, and kept the accounts thereof in his office, where some of the trustees came occasionally to make inquiries, and gave directions on matters connected with the estate; but that they kept no office and did no business as trustees, except what he did as their agent, in so collecting and paying the moneys.

It certainly cannot be said that the trustees, in thus employing Thomas, were "carrying on business;" neither do we think that they had "an office or place of business" in St. John, within the meaning of the Act. Reading the whole of the words of the section, and construing them in connection with the Act 22 Vic., c. 37, of which this section of the 31 Vic. was an amendment, we think it is clear that it was the intention of the Legislature to subject to taxation persons engaged in business, professional or otherwise—or having any office or employment—such, for instance, as book-keepers or clerks in any mercantile or mechanical establishment, or in any public de-

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partment, and who carried on such business, or followed such occupations or employment in St. John, though their places of residence were beyond the limits of the city. But it would be a forced construction of the Act to hold that a person acting as the executor or trustee of an estate, and who merely collected the interest due on mortgages, or received the dividends due on bank stocks or other securities belonging to the estate, and paid the debts, legacies or annuities to the persons entitled thereto, was "carrying on business" in the place where he received or made such payments. And if such acts of an executor or trustee would not be a "carrying on business" within the meaning of the Act, then necessarily the office or building where he generally received or made such payments and kept his accounts would not be such a "place of business" as would make him liable to be assessed under the Act as an inhabitant.

Rule absolute to quash assessment.

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IN RE ADA HELENA SHAUGHNESSY AND CORA ALBERTA
 SHAUGHNESSY,
 INFANT CHILDREN OF EDWARD SHAUGHNESSY.

Habeas Corpus—Practice—Affidavit—Surplusage.

It is not a ground for setting aside a writ of *Habeas Corpus* that affidavits on which the fiat for the writ was granted were intituled "In the Supreme Court, *ex parte*," &c., the words after "Supreme Court" being mere surplusage.

Where a Judge granted a fiat for a writ of *Habeas Corpus* against two persons, to bring up the bodies of two infant children, the Court would not set aside the writ merely on the ground that it did not clearly appear from the affidavits that they were in the custody of both.

It is not a ground for setting aside a writ of *Habeas Corpus* that two original writs were issued exactly alike, though such a proceeding was quite unnecessary. The fiat being endorsed on the writ and signed by the Judge is sufficient. It is not necessary for him also to sign the writ.

The writ of *Habeas Corpus* issues by common law, except in cases of imprisonment on charges of crime, to which only, the Stat. 31 Charles II. applies.

This was an application for a rule *nisi* to rescind an order of Mr. Justice Duff, dismissing a summons to set aside a writ of *Habeas Corpus* issued in this matter.

The material facts are stated in the following judgment of His Honor, delivered on dismissing the summons:

This is an application made to me to set aside two writs of *Habeas Corpus* issued on the 23rd May, instant, directed to Dorothea Bell

and Catherine Bell, requiring them to have before me, at a time and place therein named, the bodies of Ada Helena Shaughnessy and Cora Alberta Shaughnessy, who are detained in their custody :

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This application is made on the following grounds, viz. :

1. That the affidavit upon which the order for the writs to issue was made, is improperly intituled in a cause, when there is no cause in Court. In support of which point *Regina v. The Justices of York*,¹ and 2nd Gude's Cr. Pr., 127, were cited.

2. The affidavit does not state that the infants are in the custody of the parties to whom the writs are directed : 2nd Gude's Cr. Pr. 127.

3. It would appear from the affidavit that the infants could not be in the custody of *both* the parties to whom the writs are directed ; because that affidavit shows Catherine Bell to be the daughter of Dorothea Bell, and both residing in the same house, the latter in contemplation of law would have the custody of the children, unless it were made to appear to the contrary by the affidavit.

4. Two original writs could not issue, each of them addressed to both parties, and each requiring both parties to make return of the writ, and to produce the children.

5. A fiat for the writ should have been made by the Judge before the writ issued, and then he should have signed the writ when it did issue. Upon which point 1 Chitty's Cr. Law 125, 2 Gude's Cr. Pr. 220 and 230, and *Rex v. Roddam*,² were cited.

6. The writ should also have been marked by the Judge as issued under the Statute of Charles II. : 1 Chitty's Cr. Law 121, 126, 4 Bac. Abr. "*Habeas Corpus*" (B.) 5.

As to the first point : The affidavit is not intituled in any cause ; it is intituled, " In the Supreme Court, *ex parte* Ada Helena and Cora Alberta, infant daughters of Edward Shaughnessy." Being intituled "*In the Supreme Court*," what follows is mere surplusage ; and if the statements contained in it, or any of them, are untrue, the person who made it is liable to be indicted for perjury : *Vide ex parte O'Keefe*,³ *Hargreaves v. Hayes*.⁴ On my calling Dr. Barker's attention to the latter case, he did not press this point any further.

The second and third objections will be most conveniently dealt with together ; and I think that it appears, with sufficient certainty from the affidavit, that the children are in the actual custody of Dorothea Bell and her daughter, Catherine, who are detaining them against their father's will.

In substance the affidavit states as follows : Edward Shaughnessy, in August, 1864, being a sergeant in the 1st Battalion of Her Majesty's 15th Regiment of Foot, and being then stationed with his regiment in St. John, intermarried with Rebecca, the eldest daughter of Dorothea Bell ; and that he had issue of that marriage two children, Ada Helena, and Cora Alberta Shaughnessy ; the former being fifteen years of age on the 6th day of July last, and the latter thirteen years old on the 28th day of September last.

In April, 1868, Shaughnessy, accompanied by his wife and children,

¹ 11 Allen, 20.² 2 Cowp. 672.³ 1 P. & B. 4.⁴ 5 El. & Bl. 272.

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embarked with his regiment for Bermuda ; and at that place his wife died on 29th November, 1869. By the following mail he announced her death to her mother at St. John ; and in due course of mail he received a reply, purporting to come from Mrs. Bell, in which she requested him to bring or send his two children to St. John, and offered to take care of them, and let him have them again whenever he wanted them.

He accordingly obtained leave of absence, and came to St. John with his children, where he made an agreement with Mrs. Bell to pay her one pound sterling a month for their maintenance until he should want them again ; besides which he left with her all articles of clothing and bedding belonging to his wife and himself, which he had brought from Bermuda.

After this, the regiment was ordered to Ireland ; and from thence, on 21st February, 1873, Shaughnessy addressed a letter to Mrs. Bell requesting her to deliver the children to the Right Reverend Dr. Sweeny, whom he had authorized to receive them, and to whom he had forwarded money to pay their passage to Ireland. I cannot, properly, refer to the statement in the affidavit of what Dr. Sweeny did, or of what passed between him and Mrs. Bell, because these facts could not possibly be within Shaughnessy's personal knowledge. All that he could be personally cognizant of were the facts that he wrote the letter ; that he forwarded money to pay the passage of the children ; and that the children did not come. Whether either the money or the letter reached their destination he cannot himself testify to.

Following, however, the narrative of facts, as they are detailed in the affidavit, Shaughnessy states that, at the time when he wrote to Dr. Sweeny, he was engaged in active military life, and therefore unable to come to St. John in person ; and that whilst so engaged, he was unable to save sufficient money to defray his own expenses out, and the cost of removing his children to Ireland. And it is only since he left the regular service and accepted a position as drill instructor of Rifle Volunteers in England, in the latter part of the year 1877, that he has been able to do so.

He states that he has always had in view the restoration of his children ; and that the delay in taking steps for their recovery, since his retirement from the regular army, has been altogether owing to his inability sooner to accumulate the necessary means to defray the expenses. And the affidavit then concluded as follows :

29. "That on Friday, the 20th day of May instant, deponent demanded from the said Dorothea Bell and Catherine Bell, daughter of the said Dorothea Bell, and residing with her, the custody of the said two children, which said demand was refused.

30. "That on Saturday morning, the 21st day of May instant, deponent again called upon the said Dorothea Bell and Catherine Bell, and again demanded his two children, and was again refused.

31. "That the said Ada Helena and Cora Alberta are now wrongfully, illegally, and *against the consent of this deponent*, HELD and KEPT by the said Dorothea Bell and Catherine Bell."

I am of opinion that this affidavit is sufficient for the purpose for

which it was submitted to me. I must take the facts stated and sworn to in it, as true. And how is it possible, with the positive statement in the last paragraph, for me to say that the children are not in the custody of both Dorothea and Catherine Bell? See *Regina v. Roberts*.¹

As to the 4th point: I think it was unnecessary to have issued two writs; and that the practice is as laid down in Gude, and by analogy to that adopted in cases of *certioraris*, directed to several persons. But, although the issuing of two writs was *unnecessary*, it affords no ground for setting aside either or both writs. There is no difficulty in the parties separating in their answers; and, if the facts should warrant it, one admitting the custody of the children and the other denying it. It is impossible that the statement in the writ can control the answer. I may say that I have consulted with His Honor the Chief Justice upon this point, and he entirely concurs with me.

The 5th objection is also untenable: In England the Clerk of the Crown not only signs and seals the writ, but also prepares it in proper form, before it leaves his office. In order that he may do this, of course it is necessary for him to know to whom it is to be directed, and for what purpose it is issued. And, therefore, whenever a fiat of a Judge is necessary, before a writ can issue, it must be filed in the office of the Clerk of the Crown, before that officer can prepare the writ, and as his authority for issuing it. In this country, however, it is the attorney and not the Clerk of the Crown who prepares the writ; the latter only signs and seals it. And by the Rule of Trinity Term 23rd Victoria, it is ordered, "That *blank writs of Habeas Corpus* and others which require the fiat of a Judge indorsed thereon, before they can be issued for the purpose of being executed, and blank writs of subpoena may be delivered to the respective attorneys of this Court signed and sealed, to be by them filled up as occasion may require; they accounting to the Clerk therefor, and forwarding to his office proper præcipes for such of the said writs as they may from time to time fill up and issue, stating in the præcipes the name of the Judge whose fiat has been indorsed, where a fiat is necessary."

The præcipe, it will be observed, refers to the name of the Judge whose fiat has already been indorsed on the writ; and cannot possibly have relation to a fiat or præcipe filed before the writ is issued.

Under this rule the writs in question were issued to the attorneys, filled up by them, and brought to me, and I indorsed my fiat thereon, "Let the within writ issue;" which is the only fiat our practice requires. The attorneys may hereafter file their præcipe, as was formerly done for all writs issued out of the Supreme Court.

The 6th objection is made entirely under the Statute of Charles II. The Statute applies only to persons detained in prison on criminal charges, and not to a case of this kind. This writ would lay at Common law, and was not issued under the Statute of Charles II. at all. The contention that, at Common law a Judge could not order a writ of *Habeas Corpus* to issue in vacation is directly in the teeth of *Leonard Watson's case*,¹ where Mr. Justice Littledale granted his fiat for

1861.

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SHAUGHNESSY¹ 2 F. & F. 272.¹ 9 A. & E. 731, 778.

1881. the writ of *Habeas Corpus* in vacation; and after a most elaborate argument, and after consideration, the Court decided that a single Judge had the power to order the writ to issue in vacation.

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I am of opinion that none of the objections can prevail, and that the summons must be dismissed.

June 14. *Blair*, in support of the motion, relied upon the objections taken before Mr. Justice Duff, and cited on the first point 2 Gude's Cr. Pr. 127, and *Ex parte Nohro*.¹ [WETMORE, J., referred to *Davidson v. O'Connell*.²]

The affidavits, he argued did not shew the children in custody of the defendants. [KING, J. They are shewn to have been in their custody at one time for the purpose of bringing up, and surely it is not necessary for the applicant to show the continuous possession. ALLEN, C. J. He says, that on the application of Mrs. Bell, he sent the children to her; that he had demanded them and that they wrongfully kept the possession. But, suppose there is no case against Catherine, and there is against Dorothea, would that make the writ bad? Catherine could return that she had no possession.] The writ is bad. A writ should not issue against a person unless a case is made out. [KING, J. It is a question whether the fiat is not conclusive.] I submit it is not. There is nothing to shew that Catherine exercised any control whatever over the children. On the fifth point I cite *Rex v. Roddam*,³ 2 Gude 220, 230. It is not a compliance with the Statute for the Judge to issue his fiat; he must sign the writs. [ALLEN, C. J. The Statute does not say he must subscribe the writ: indorsing, "let this writ issue," and signing his name,—is not that a signing? That has always been the practice.] The 6th objection is also fatal. [ALLEN, C. J. The writ, in a case like this, does not issue under the Statute of Charles. *Hab. Corp.*, issued at Common law.] At Common law, at all events, a single Judge could not issue *Hab. Corp.* [WETMORE, J., refers to Bac. Abr., which says, "Courts of Common law and Chancery could issue writs of *Hab. Corp.* at Common law."] I admit that, but the Judge's power was derived from the Stat. of Charles and the writ must be indorsed as provided by the Statute. [KING, J., referred to Chit. Cr. Law.]

Cur. adv. vult.

¹ 1 B. & C. 267.

² 3 Puga. 684.

³ 2 Cowp. 672.

The judgment of the Court, (ALLEN, C. J., and WELDON, WETMORE, DUFF, and KING, JJ.) was now delivered by

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ALLEN, C. J. I think none of the objections made to the decision of Mr. Justice Duff in this matter are sustainable.

It is unnecessary to refer in detail to the grounds taken for setting aside the writs, as we think they have been satisfactorily disposed of; and we only wish to add a few observations on some of the objections.

Admitting for the purposes of the argument that the affidavit of Edward Shaughnessy, the father of the children, did not clearly shew that they were in the custody of both Dorothea and Catherine Bell, and that this Court has a right to review the decision of the Judge in a matter of which he alone is to be satisfied when the application is made for the writ, and of which he was satisfied when he granted his fiat, we do not think such an objection to the affidavit would be any ground for setting aside the writ. If Catherine Bell had no custody or possession of the children she could shew that fact by her return to the *Habeas Corpus*, and thus relieve herself from the responsibility if the return was in other respects sufficient.

As to the objection that two writs could not be issued,—though undoubtedly it was an unnecessary proceeding, we are not prepared to say that it is a ground for setting aside either of the writs. Probably, if a sufficient return was made to one of them, it would be enough; and no proceedings could be taken against the parties for not returning the other writ; but if they should make returns to both, we do not see that the fact of the answer of the parties being in duplicate would in any way affect the power of the Judge in adjudicating on the matter before him.

We entirely agree with Mr. Justice Duff that the writ was not issued under the Statute 31 Charles II., which only applies to cases of imprisonment on charges of crime. See *Carus Wilson's case*,¹ per Pattison, J. Blackstone says, that the writ of *Habeas Corpus* issues by Common law out of the Court of King's Bench, not only in term time, but also in vacation; 3 Bla. Com. 21st ed. 131, 137. See also *Leonard Watson's case*.²

If the writ was not issued under the authority of the Statute

¹ 7 Q. B. 1009.² 9 A. & E. 731.

1881. of Charles II. it could not properly have been indorsed as issued,
In re "per statutum," etc. In Carus Wilson's case (*supra*) where a
 SHAUGHNESSY *habeas corpus* issued to bring up a prisoner in custody for con-
 tempt of Court, one of the objections was, that the writ was
 not conformable to the Statute of Charles II., not being marked
 as issued "per statutum;" but the objection did not prevail, it
 being held to be a writ at common law.

The direction in 2 Gude's Cr. Pr. 230, that the "*fiat* and also
 the writ itself must be signed by the Judge," is not applicable
 to the practice of this country, where the Rule of Court author-
 izes the Clerk of the Crown to issue blank writs, to be used as
 writs of *Habeas Corpus*, and filled up by the attorney; the *fiat*
 of the Judge indorsed upon the writ in this case was sufficient
 authority to issue it, and the only *fiat* which our practice
 requires.

The application will be refused.

Rule refused.

1881. SIMON LEONARD, ARTHUR W. MASTERS, AND DAVID
 June. H. CALHOUN, APPELLANTS,
 AND
 JAMES GRIFFIN, RESPONDENT.

*Insolvent Act—Where one partner purchases from Assignee estate of
 Insolvent firm, en bloc—Right to sue for debts due firm in his
 own name—Payment—What constitutes—Where money received
 by person being partner in two firms.*

G. & L. were merchants doing business in S., the firm being composed of the
 respondent and W. S. L. The latter was also a member of the firm of S. L.
 Son & Co., also doing business in S. The latter firm was composed of W. S.
 L. and one of the appellants, S. L. The appellants were owners of the brig-
 antine "Flora," of which S. L. was registered as managing owner. G. & L.
 by direction of the managing owner gave supplies to the vessel, and were to
 be repaid out of the freight to be earned on her then intended voyage. Sub-
 sequently, on Nov. 18, 1878, G. & L. were put into insolvency, under the
 Insolvent Act of 1875. The respondent obtained from his individual and co-
 partnership creditors a discharge, and the assignee duly executed to him a
 transfer of the whole estate.

Respondent then brought a suit, in his own name, as purchaser of the estate, in
 the County Court, against appellants as owners of the vessel, for recovery of
 the price of the supplies furnished.

Held, (1.) That the respondent had rightly brought the action in his own name,
 (2.) That the fact of S. L. Son & Co., of which firm W. S. L. was a member,
 having received the freight would not affect plaintiff's right to recover for
 the supplies.

This was an appeal from the County Court of the City and

County of Saint John. The facts of the case were as follows:— Griffin & Leonard were merchants doing business in the City of Saint John, and the firm was composed of the respondent, James Griffin and William S. Leonard. William S. Leonard was also a member of the firm of S. Leonard, Son & Co., also doing business in the said city. The latter firm was composed of the said Wm. S. Leonard, and one of the appellants, Simon Leonard. The appellants were the owners of the brigantine "Flora," of which Simon Leonard was registered as the managing owner. The firm of Griffin & Leonard by direction of the managing owner gave supplies to the vessel, and were to be repaid out of freight to be earned on her then intended voyage. Subsequently Griffin & Leonard became insolvent under the Insolvent Act of 1875, and a writ of attachment issued against them dated 18th Nov., 1878. The respondent, James Griffin, obtained from his individual and co-partnership creditors a discharge and a transfer of the entire co-partnership estate and effects, in consideration of the payment of \$300. The discharge was duly confirmed by the Judge, and the deed of transfer to the respondent was duly executed by the assignee. The respondent, after the transfer, brought a suit in his own name, as purchaser of the estate, in the County Court against the appellants, as owners of the vessel, for the recovery of the price of supplies furnished.

It appeared in evidence that Wm. S. Leonard had informed the appellant, A. W. Masters, that the firm of S. Leonard, Son & Co., had drawn a bill for part of the freight; had received the amount, but that it had gone in paying other claims. Whether this conversation took place before or after the insolvency of Griffin & Leonard did not clearly appear.

Before the arrival of the vessel on the other side, her management was taken out of the hands of S. Leonard and given to the appellant, A. W. Masters. A verdict was given in the Court below for the full amount claimed, and the learned County Court Judge, on application, refused to disturb the verdict. From that judgment the present appeal was taken.

June 25. *Weldon, Q. C.*, and *Masters*, for the appellants. Wm. S. Leonard, and the plaintiff, (respondent), were partners and furnished the goods. Griffin & Leonard became insolvent.

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McLeod, assignee, sold the whole estate, *en bloc*; the respondent purchased, and McLeod assigned it to the respondent.

The first question is whether Griffin can maintain the action in his own name. 2nd. The appellants allege Wm. S. Leonard was a partner with Simon Leonard, one of the appellants under the name of Simon Leonard, Son & Co., and that that firm received the money to pay this debt, and we contend, as it came into the firm's hands, it was a payment.

There is no question about the Insolvent's right to purchase, but there is, as to whether the deed *en bloc* conveys the book debts. 2nd, Whether as to the book debts, the transferee stands in the same position as a purchaser of the debts only. Sec. 67 requires debts to be sold at public auction. See sec. 38 of Insolvent Act; *Jeffery v. McTaggart*;¹ *Harrison v. Frazie*.² [PALMER, J. When the Statute makes the transfer convey the whole estate, I don't see how any right to sue can remain in the transferor.] The sale of the estate *en bloc* only passes real and personal estate, and gives no right of action: Insolvent Act, sec. 38. It might be that it would include debts if there was no other provision of the Act; but there is a special provision: sec. 67. [KING, J. Must there not be some provision in the Act as to recovering debts sold as part of the estate *en bloc*?] We can find none.

Leonard admitted he had received the money to pay the bills. [KING, J. Is it not equally consistent that that conversation was after the insolvency?] There is nothing positive, but as Leonard was then trying to collect the money, it was probably before. If the money came into the hands of William S. Leonard, it was a payment of the debt. The Judge should have left it to the jury as to whether it did come into the hands of William S. Leonard to pay this amount.

A. A. Stockton, for the respondent.

The insolvent can purchase the estate, and sue for the recovery of debts in his own name. The fact that only one of the insolvents became the purchaser does not alter this effect. The estate was sold *en bloc*, as provided by sec. 38 of the Act. The term "estate" comprehends everything that becomes vested in the assignee under the Act,—the entire estate, including choses.

in action of all kinds; and the deed of transfer thereof by the assignee, under a sale *en bloc*, conveys to the purchaser everything that became vested in the assignee. The sale of debts under section 67, only applies to those too onerous or doubtful for the assignee to collect. The deed of transfer in this case vested in the respondent the entire estate, including choses in action. He has therefore a right under section 69 to sue for the recovery of the same, in his own name. The case of *Kitson v. Hardwick*,¹ is an authority directly in favor of respondent. The opinion of Willes, J., in that case is, that where the law allows the assignment of a chose in action, the power to bring an action in respect of it necessarily follows. As to the second objection, there is no evidence that W. S. Leonard was a partner of the firm of S. Leonard, Son & Co. But if he were, the mere receipt of freight money by S. Leonard, Son & Co., as managing owners, would not be a payment to Griffin & Leonard. S. Leonard was on the registry as managing owner. W. S. Leonard had no interest in the vessel. There is no evidence that S. Leonard, Son & Co. received any money from freight *specifically* to pay this claim. Money was received by them to pay bills generally, but it went some other way, and this claim was not paid. They, as managing owners, were not responsible to pay any money to Griffin & Leonard, but to the owners of the vessel—the appellants in this case; and the owners were liable to Griffin & Leonard for necessary stores furnished the ship by direction of the managing owner. It is submitted the learned Judge in the Court below was right in refusing a new trial, and this appeal should be dismissed and with costs.

Masters, in reply.

Per curiam,

Appeal dismissed with costs.

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¹L. R. 7 C. P. 473.

1881.

NICHOLSON v. TEMPLE.

June.

Certificate for costs—Where judge, who tried cause, dies before giving certificate.

Where the judge who tried a cause has died without giving the plaintiff a certificate for costs, he is without remedy, as another judge cannot grant the certificate.

This was an application for a certificate for costs, the verdict having been for an amount under \$100. The judge, (Mr. Justice Fisher,) who tried the cause having died, pending an appeal to the Supreme Court of Canada, application was made to Mr. Justice Weldon for the certificate, and he referred the matter to the Court.

June 16. *E. L. Wetmore* for the plaintiff.

In this case the plaintiff showed by affidavits that his counsel spoke to Judge Fisher and he said he would give the certificate, but owing to the appeal it was not got. Under the circumstances I think another judge can grant the certificate.

Reading the section, upon its face, the judge who tried the cause alone could grant the certificate, but under chapter 118, section 1, sub-section 2, "authority to a justice of any court to do any act shall empower any other justice of the same court to act in his stead when necessary." Unless this applies to a case where a power is cast on a particular judge to act, it would be senseless. The words are certainly very large.

He also discussed the merits, but it is not necessary to give the argument respecting them.

George F. Gregory, contra. Section 50 provides that the certificate must be granted by the judge who tries the cause. Costs are first taken away. [KING, J. We ought, however, to start with the idea that, under the Statute of Gloucester, plaintiffs are entitled to costs as a matter of right.] Then there is no authority which can interfere with the taking away of costs under the first part of the section, except the judge who tried the cause.

[KING, J. The statute in effect says the matter of costs shall be determined by the judge who tried the cause, and if he cannot determine them some other judge must of necessity do so.]

Then there is no necessity of a certificate. The costs are ex-

pressly taken away unless such a thing is done. [ALLEN, C. J. That is the difficulty to my mind.]

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Judgment is to be exercised as to the necessity for another judge acting, and the judge in whom the power is vested is to judge of the necessity.

[ALLEN, C. J. Suppose a judge had granted a summons on review from a Justice's Court and he died before the hearing, could not another judge act in his place?] I submit not. [ALLEN, C. J. I think he might under chapter 118.] If so, that would be a case under that chapter and therefore it is not open to the argument, that unless this case is under it the section would be useless. Another judge cannot be put in the stead of the judge who tried the cause.

[KING, J. Is not this a matter of procedure to be determined, certainly by the judge who tried the cause if possible? If he is dead, must it not be determined somehow?] The Legislature has itself determined the matter—it has taken away the costs except in one event. It is strange we can find no decisions on the point. I am informed there is a case which arose after the death of Mr. Justice Taunton where another judge refused to grant certificates; but I cannot find such a case.

Wetmore, in reply.

Cur. adv. vult.

The judgment of the Court, (ALLEN, C. J., and WELDON, WETMORE, DUFF, and KING, JJ.,) was now delivered by

ALLEN, C. J. It is admitted that no certificate can be granted in this case, unless it comes within the provisions of the 118th chapter of the Consolidated Statutes, which enacts that in the construction of all Acts of Assembly the rules thereafter mentioned shall be observed with respect to certain terms, unless otherwise expressly provided for, or such construction would be inconsistent with the manifest intention of the Legislature, or repugnant to the context. Then follows the clause which is relied on by the plaintiff, viz.:—"Authority to a Justice of any Court to do an act shall empower any other Justice of the same Court to act in his stead when necessary."

We think this provision does not apply to a case like the present. "The manifest intention of the Legislature" was that the Judge who tried a cause, and had a full knowledge of all the

1881. circumstances should be the person to determine whether the
 NICHOLSON plaintiff had good cause for bringing the action in this Court.
 v. If the plaintiff is prevented by the death of the Judge from
 TEMPLE obtaining such certificate, we think he is without remedy.
 This was admitted in a somewhat similar case, *Borradaile v. Nelson*,¹ and expressly decided in *Southwell v. Bird*,² and *Astley v. Joy*.³

Motion refused without costs.

1881. IN THE MATTER OF BECKWITH AND ANOTHER, STUDENTS-AT-LAW.
 June. Attorney—Admission of—Where applicant had no notice of new Bye-Laws of the Barristers' Society.

The Bye-Laws of the Barristers' Society relating to the admission of Attorneys, approved by the Court in Easter Term last, were not published until May. Two students-at-Law, who, under the new Bye-Laws, might have been admitted in Easter Term, had no notice of the rules, and came up at this Term for examination. The Barristers' Society having recommended their admission, the Court, under the peculiar circumstances of the case, allowed the applicants to be enrolled, stating, however, that this must not be considered a precedent for any departure from the rules in future.

June 22. *Fraser, A. G.*, moved that Robert Beckwith and Charles Edward Sumner, be admitted Attorneys of the Court, reading a resolution of the Barristers' Society, recommending their admission.

The facts relied on in support of the motion, are stated in the judgment of the Court, [ALLEN. C. J., WELDON, WETMORE, and PALMER, JJ.] which, on the following day, was delivered by—

ALLEN, C. J. These young gentlemen are in this position, They have completed the necessary term of study, and would have been entitled to come up for examination at the last Easter term under the altered Bye-Laws of the Barristers' Society. These Bye-Laws, however, were only approved of very late in the term, and were not published in the *Gazette* until May, and these gentlemen had no notice of them until after the term had passed. Therefore, under the peculiar circumstances of this case, and the Barristers' Society having recommended their admission, the Court will allow them to be enrolled. This, however, must not be taken as a precedent for any departure from the rules in future.

The applicants were sworn and enrolled accordingly.

THE QUEEN v. DAYTON AND ANOTHER.

1881.

Practice—Rules Nisi—Where not entered on Crown paper—When applicant entitled to have made absolute.

July.

A rule nisi having been taken out and served, requiring defendants to shew cause at this term why a certain conviction made by them as Justices should not be quashed, they did not enter the case on the Crown paper.

Held, That the second motion day of the term was the proper time for moving to make the rule absolute.

June 25th. *Quinn* moved to make absolute a rule nisi, to quash a conviction by the defendants of one White. The rule was granted in Easter Term last requiring the defendants to shew cause at the present term why the conviction should not be quashed. The defendants did not enter the case on the Crown paper, and he submitted that he was now (this being the last common motion day) entitled to have the rule made absolute.

Cur. adv. vult.

The judgment of the Court was now delivered by—

ALLEN, C. J. This was an application to make absolute a rule nisi to quash a conviction.

The rule was granted in Easter Term last, requiring the defendants to shew cause at the present term why the conviction should not be quashed; and if cause was intended to be shewn the defendants should have entered the case on the Crown paper on the first day of the present term. Not having been so entered, a motion was made on the second Saturday in the term to make the rule absolute; but some doubt was expressed whether the motion was not premature, and whether the defendants had not the whole term, within which they could enter the case on the paper by leave of the Court. See *Groves v. Sisson*.¹

At the time that case was decided, the Term only lasted two weeks, and the last day of the Term—the second Saturday—was a common motion day on which parties were entitled to move to make absolute rules nisi returnable at the Term, and against which no cause had been shewn or entry made to shew cause. But now, though the Term continues till the third Saturday, the last day of the Term is not a Common motion day, and therefore we think it would be unreasonable to com-

¹¹ *Kear*, 102.

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pel parties who have obtained rules *nisi* to set aside proceedings—and which rules, unless otherwise stated, are returnable on the first day of the Term after that on which they were granted—to wait till the succeeding term before they can move to make such rules absolute for default of entry on the proper paper.

The Rule of Hilary Term last requires that all entries on the respective papers be made before the opening of the Court, on the first day of Term, and that no entry shall afterwards be allowed, except for good cause shewn, and upon motion made on one of the common motion days. It was the defendants' duty, therefore, if they intended to shew cause against the rule, but had omitted to enter the case on the Crown paper, to apply for leave to do so, at the latest, on the second common motion day. Not having made any such application, we think the party who obtained the rule *nisi* was entitled to move to make it absolute on that day.

Rule absolute to quash the conviction.

1881.

July.

KNOX ET AL. v. GREGORY.

Practice—Attorneys—Understandings.

It is much better that Attorneys should carry on their business according to the established rules of practice than by understandings, which generally lead to disputes.

June 14. *Wallace*, for the defendant, moved to set aside an order of *Weldon, J.*, made at Chambers, dismissing a summons to strike this cause off the docket. He cited *McLelland v. Masson*.¹ The statements in the affidavits used before the judge were conflicting, and, as the only value of the judgment is in the remarks of the Court as to the advisability of attorneys carrying on their business according to the established rules of practice, rather than by understandings, it will not be necessary to give the facts further than as they are referred to in the judgments.

The Court took time to consider and on a subsequent day the following opinions were delivered:—

WETMORE, J. This cause stood as a remanet by order made at the March Circuit for St. John, and being on the

remanet docket at the May Circuit, the presiding judge, on application of the plaintiffs' attorney, ordered it to stand as a remanet for the St. John August Circuit. The defendant's attorney, on the 21st May, obtained summons from Justice Weldon to strike the cause off the docket for the May Circuit, on the ground that *no notice of trial had been served or given according to the rules and practice of the Court*; which was discharged after hearing at its return.

Where a cause is made a remanet notice of trial is necessary: *Fraser v. Harding*.¹ The affidavit of Mr. Wallace, the defendant's attorney, on which summons was granted, stated that no notice of trial whatever had been given to or served on him for the May Circuit. An affidavit of the plaintiffs' attorney, Mr. Forbes, was used on shewing cause, which, after detailing some proceedings about a commission which issued on the defendant's application, in paragraph five, (I give the exact words of the affidavit): "That the defendant's attorney expressed his fears that it would be impossible for him to have the commission returned by that date," (referring to the time Mr. Justice King had fixed for the return of the commission, 13th May, mentioned in a previous paragraph,) "when I stated on behalf of the plaintiffs that I was willing the cause would stand, and by consent, and he would now accept notice of trial for the then next Circuit Court; that on my return to my office I made the following entry in my minute or præcipe book 'April 17, attg. before Judge King as to commission, Wallace accepts service as for May Circuit of notice of trial on condition that commission is returned by Friday, May 13th, cause not to be pressed until 20th, this agreed to by Wallace.'"

The conversation with Wallace does not seem to agree with or warrant this entry. Mr. Forbes states he said to Wallace he was willing the cause would stand and he, that is he, Forbes, would accept notice of trial. It is not stated that Mr. Wallace was willing it would stand or that he would accept notice of trial for the next Circuit Court. In paragraph six Mr. Forbes states, among other matters not necessary to refer to, that about the first of May, Wallace told him he did not propose to go to trial unless he was ready as he had received no notice of

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trial. When Forbes called his attention to the agreement and understanding of the 17th, Wallace replied he did not propose to have his client sworn in a hole. In paragraph seven Mr. Forbes says he, thereupon, immediately prepared a notice of trial for the May Circuit and offered it to Wallace which he refused to accept. The time this notice was offered Wallace would not give fourteen days, the Circuit opening on the tenth. Mr. Forbes and Mr. Wallace do not agree in their general account of the transaction, but Mr. Wallace swears positively he did not get the required notice of trial and I have stated Mr. Forbes' account of what notice, if any, was given. The other parts of the affidavits I do not think it necessary I should refer to.

Mr. Wallace's denial of any notice of trial being given is corroborated by Mr. Forbes giving him a written notice of trial about the first of May, which is dated 21st April, 1881. It was a very easy matter for Mr. Forbes to have given the ordinary notice of trial—it was a matter he had the entire control of. He wanted no consent from Wallace, nor does it seem he had any; from the statement in his affidavit, *he, Mr. Forbes, consented*; the consent of Mr. Wallace, however, was what was required, and if he had such consent, why not rely upon it instead of giving a written notice of trial about the first of May? If gentlemen will rely upon understandings instead of following the established practice, they must take the consequences that arise from misunderstandings, which we all know too frequently occur, and when difficulties arise the party relying on an understanding must be prepared to make the matter of the understanding out to a reasonable extent, at the least, which, I think Mr. Forbes has not done in the present case. The wording of his affidavit, whatever he intended to put forward, does not, apart from the entry in his præcipe book, which as before stated I don't think the alleged conversation warranted, show any consent of Mr. Wallace, and whatever inference might be drawn from what is stated, it is completely destroyed by the fact of the written notice of trial being given after Mr. Wallace stated he had not received any notice for trial and too late for the Circuit. Under the circumstances, I think the positive statement of Mr. Wallace, that

he had not received any notice of trial, should for the present prevail, and that he is entitled to the rule *nisi* moved for. No doubt expense would attend the granting of rule *nisi*, and it may be this application would be successfully answered, still if notice of trial has not been given, which so far appears to be the case, or such an understanding established as does away with the necessity of such notice, which so far does not appear, the defendant is entitled to have the cause struck off the docket as a clear legal right, which I don't feel myself justified in denying him, and apart from the question of legal right, allowing the cause to stand as a remanet, under the circumstances, as at present before the Court, affords countenance to a loose system of practice which I think very dangerous to encourage by a considered judgment of the Court.

ALLEN, C. J. As the statements in the affidavits used before Mr. Justice Weldon on the application to strike this cause off the docket, were conflicting in respect to the agreement to go to trial at the May Circuit, I cannot say that he was wrong in refusing to make the order.

If a rule *nisi* should be granted in this case, it would add considerably to the expense which one or the other of these parties will be obliged to pay, and would not be of any practical advantage if made absolute. I cannot see that the defendant will be prejudiced by allowing the cause to stand as a remanet, therefore, under the circumstances, it will be for the benefit of both parties to refuse this application.

I do not wish to be understood as by any means encouraging a loose mode of practice between attorneys. It is much better that they should carry on their business according to the established rules of practice than by understandings, which generally lead to disputes.

The rule will be refused. Mr. Justice Duff and Mr. Justice King agree in this conclusion.

Rule refused.

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JONES v. THE MUNICIPALITY OF ALBERT.

July. *Debentures issued under 38 Vic., c. 85—In hands of third parties—Coupons—Interest on.*

Held, adhering to the opinion expressed in this case in 4 P. & B., 78, that Debentures issued under 38 Vic. c. 85, sealed with the seal of the General Sessions of the County of Albert, acquired by the 4th section of the Act, a negotiable character like promissory notes payable to bearer, and that, in the hands of third parties, their validity could not be questioned. Interest on coupons is not recoverable.

This was an action brought to recover the amount of several coupons for interest upon certain debentures issued under 38 Vic., c. 85, and bearing the seal of the General Sessions of the County of Albert. One of the defendants' pleas denied that the debentures had been issued in the manner required by the Act, but the plea was held bad on demurrer. (See 4 P. & B. 78.)

The issues in fact came on for trial before Mr. Justice Duff, at the St. John Circuit, in August, 1880. The plaintiff proved the seal of the General Sessions of the County of Albert attached to the debentures; the signature thereto of Mr. Lewis, who acted as Chairman of the Sessions, and also that of Mr. Morse, the Clerk of the Peace. The debentures were dated in July and September, A. D. 1875; and the coupons were made payable half-yearly. The counsel for the defendants offered to prove that the requirements of the law had not been complied with in issuing the debentures, but the learned Judge rejected the evidence.

A verdict was found for the plaintiff for the amount of the coupons, and also for \$32.28 interest on the coupons, leave being reserved to reduce the verdict by the latter sum.

Oct. 22, 1880. *C. A. Palmer*, for the defendants, moved for a new trial, and contended that the evidence was admissible under the pleas of never indebted, as, if the debentures were not legally issued, there could be no indebtedness. He also submitted that plaintiff's remedy, if any, was by way of mandamus. At all events, the interest on the coupons could not be recovered.

Weldon, Q. C., contra, relied on the previous judgment given on the demurrers, but admitted that he was doubtful about plaintiff's right to interest on the coupons.

Cur. adv. vult.

The judgment of the Court was now delivered by

ALLEN, C. J. This was an action brought to recover the amount of several coupons for interest upon certain debentures issued under 38 Vic., c. 85; and bearing the seal of the General Sessions of the County of Albert. The case was before the Court on a previous occasion, on demurrer to several of the pleas, and judgment was given for the plaintiff on all the demurrers. (See 4 P. & B. 78.)

One of the pleas which was then held to be bad denied that the debentures had been issued in the manner required by the Act of Incorporation.

The issues in fact came on for trial before Mr. Justice Duff at the Saint John August Circuit, 1880. The plaintiff proved the seal of the General Sessions of the County of Albert, attached to the debentures; the signature thereto of Mr. Lewis, who acted as Chairman of the Sessions and also that of Mr. Morse, the Clerk of the Peace. The debentures were issued in July and September, 1875, and the coupons were made payable half-yearly at the Bank of New Brunswick; presentment of which at the Bank was admitted to have been made.

The counsel for the defendants offered to prove that *no order* had been made for the issuing of the debentures at any General Sessions of the Peace of the County of Albert in 1875; that no certificate of the Town Clerk of the Parish of Elgin, of the election mentioned in chap. 85, sec. 9, was ever produced at any Special Session of the General Sessions, at which Mr. Lewis presided; that Mr. Lewis, whose name was subscribed to the debenture in evidence, was not Chairman of any General or Special Sessions, at which any order for the issuing of the debenture was made; that no certificate of the engineer appointed by the Governor in Council, as required by chap. 85, section 2, was ever produced at any Court of General Sessions of which Mr. Lewis was Chairman; that the sufficiency of no such certificate was ever passed upon by any Court of Sessions at which Mr. Lewis was Chairman, as required by the 2nd section; and that these debentures had never been issued by the General Sessions.

The learned Judge rejected the evidence; and we think it was properly rejected. Every fact which the defendants' coun-

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sel offered to prove, had already been pleaded, and upon demurrer, the pleas had been pronounced to be bad. In our judgment, on that occasion, we said that the debentures under the seal of the Sessions, "acquired by the 4th section of the Act a negotiable character like promissory notes payable to bearer. They got into the hands of third persons, stamped, as it were, with the declaration of the Act, that on their issue, *it shall be taken that everything required by the Act to make them valid had been done* ;—in other words, that they were a legal and binding security for the amount which they represented, and that their validity could not be disputed."

The jury found for the plaintiff, and assessed the damages at \$230.28, including \$32.28 for interest on the coupons, from the date when they respectively became payable, with leave for the defendants' counsel to move to reduce that verdict by the latter amount, if the Court should think that interest on the coupons was not recoverable. No authority has been cited for the recovery of such interest, and we think it cannot be allowed.

The verdict will therefore be reduced by the sum of \$32.28; and the rule for a new trial will be refused.

Judgment accordingly.



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LUNT ET AL. v. LLOYD.

June.

Negligence—Placing anchor of Dredge in channel of public harbour—Master must place buoys or signals—Where Dredge the property of the Crown, and being used in improving navigation—Liability of master for acts of fellow servants of the Crown.

By the first count of the declaration it was alleged that the master of a Government Dredge placed the anchor of the Dredge in the main channel of a public harbour, with the fluke of the anchor sticking up, and so left it, for an unreasonable length of time, without placing any proper buoy or signal to mark the place of the anchor, and without taking any proper means to guard against accidents to vessels navigating the harbour, and that the plaintiffs' mariners having occasion to pass out of the said harbour with the plaintiffs' vessel, without any default on their part, ran upon the anchor, and injured the vessel.

Held, that the count described a good cause of action; that the master of the Dredge should have placed a buoy to the anchor to warn vessels navigating the harbour.

By the third count it was alleged that the master of a Dredge placed the anchor of the Dredge in a part of the Channel of a public harbour usually navigated by vessels, in a dangerous and improper position, and permitted the same to remain in such dangerous and improper position, and that the plaintiffs' vessel in passing out of the said harbour in charge of their mariners

without any knowledge on the part of the latter of the improper and dangerous position of the anchor, and without any default on their part, ran on the anchor and was injured, &c.

Held, that the count disclosed a good cause of action.

By the plea the defendant, the master of the Dredge, alleged that the Dredge was the property of Her Majesty, and was being used in dredging out and improving a public harbour, that, for this purpose, dredging, it was necessary to anchor it, and that he directed A. McL. and others to put the anchor out, and that they placed it in the manner alleged in declaration, without any knowledge on his part that it was carelessly and improperly put out, and that A. McL. and the others were not employed by him, but were his fellow servants in the employ of Her Majesty.

Held, that the plea did not afford an answer to the declaration, that the master of the Dredge having directed the men to put out the anchor in a place where it might be dangerous to navigation, could not excuse himself by saying the men were his fellow-servants in Her Majesty's employ, and that he did not know it was negligently or improperly placed there.

Demurrer to the first and third counts of the declaration, and to the second, third, fifth, and seventh pleas. On the argument the second and fifth pleas were admitted to be bad. The third and seventh pleas were substantially the same.

First count: For that whereas before the happening of the damage and injury hereinafter in this count mentioned, a certain steam dredge or vessel of and belonging to the Government of the Dominion of Canada, and of which the defendant was then in possession and of and over which the defendant then had the care, management, direction and control, was lying at anchor of and in the main channel of Bathurst harbour; the said part and place of the said channel being one wherein no obstruction to the navigation previously existed, and then and from thence hitherto and still being a public highway for all persons to navigate and pass and repass by and with their ships and vessels at their free will and pleasure, and in and along which divers ships and vessels were and are used and accustomed to be navigated and pass and repass without obstruction, the anchor of which said steam dredge or vessel then lay in the said main channel with its fluke sticking upwards under water there and wholly covered and concealed and out of view, in such a position and at such a depth that vessels in navigating and passing in and along and over the said part and place where the said anchor so laid sunk as aforesaid, would necessarily be and were in danger of striking against the same and of being greatly damaged and injured. That the said defendant suffered and permitted the said anchor to be and the same continued so sunk and lying in the said part and place of and in the said channel under water there covered, concealed, and out of view, in such a position and at such a depth as aforesaid, for a long and unreasonable time, until the happening of the damage and injury hereinafter in this count mentioned, without taking or causing to be taken any proper care or precaution in that behalf, and without taking or causing to be taken any due or proper means to prevent or guard against the said damage, or whereby said damage might be prevented, and guarded against to vessels then navigating in and along the said part of the

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said channel, and without putting and placing or causing to be put and placed in the said part, any proper buoy or other proper and sufficient mark and signal, to give due warning of the said danger, that whilst the said anchor was and continued so lying as aforesaid without any proper or sufficient buoy, or other proper or sufficient signal, or any other due or proper means being used to give notice or warning of the said danger, the plaintiffs were lawfully possessed of a certain steamboat or vessel, which was then lawfully navigating and passing in and along the said part and place of, and in the said channel, under the care, direction and management of certain mariners and servants in that behalf of the plaintiffs, and the said vessel being then so navigated, and passing in and along the said part and place of, and in the said channel, and the plaintiffs and their said mariners and servants not having any knowledge or sufficient means of knowledge of the said danger, and no due and proper care or precaution being taken by the said defendant to prevent or guard against the same, and the plaintiffs, by their said mariners and servants then having lawful occasion to navigate and direct their said vessel in and along and over the said place, where the said anchor so then lay sunk as aforesaid, the plaintiffs by their said mariners and servants did then, to-wit, on the thirtieth day of July in the year of our Lord one thousand eight hundred and seventy-five, accordingly navigate and direct their said vessel in, along, and over the said place, and thereby and by means of the premises, and of the said misconduct, omission, and neglect of the defendant, and without any neglect or default of the plaintiffs or their mariners and servants, the said vessel of the plaintiffs was then driven and struck with great force and violence upon and against the said sunken anchor, and was thereby then greatly broken, stove in, damaged, and injured insomuch that the said steam vessel of the said plaintiffs then sunk and went to the bottom in said channel and thereby and by reason and means of the premises the plaintiffs have been forced and obliged to pay, lay out, and expend and have necessarily laid out and expended and become liable to pay a large sum of money, to-wit: twenty thousand dollars, in and about the raising of their said steam vessel, and in and about the repairing of the said damage so done and occasioned to their said steam vessel as aforesaid, and also by means of the premises, the plaintiffs lost and were deprived of the use of the said steam vessel for a long space of time, whilst their said vessel was so sunk as aforesaid, and whilst she was so being raised as aforesaid, and whilst she was so being repaired as aforesaid, to-wit: for the space of three months; and thereby lost and were deprived of all the profits and advantages, which during that time they might and otherwise would have derived and acquired from the use of their said steam vessel, and the said steam vessel thereby became and was and is greatly lessened in value.

Third count: That the plaintiffs were heretofore the owners of and lawfully possessed of a certain vessel called "*The City of Saint John*," then lawfully being in the harbour of Bathurst, in the public navigable channel thereof, that the said defendant was in charge of and had the management and control of a certain Dredge then being

in the said harbour of Bathurst, and, although well knowing the said channel, and that the same was used in navigating vessels entering in and departing from the said harbour, the said defendant before the committing of the grievance hereinafter mentioned, placed and fixed and caused to be placed and fixed in the said channel, in a part ordinarily used in the course of navigation, a certain anchor of and belonging to the said Dredge, in so careless and negligent a manner, and with so little care and precaution that the said anchor was in an improper and dangerous position covered by water, and invisible, and continued and permitted the said anchor to be and remain in such improper and dangerous position as aforesaid, and that by means thereof the said vessel of the said plaintiffs then, to-wit: on the 30th day of July, A. D., 1875, lawfully going and passing in the said channel, under the charge of the mariners and servants of the said plaintiffs, and without any knowledge on their part of the improper and dangerous position of the said anchor, and without any default on their part, ran foul of and struck against and on the anchor so placed and fixed by the defendant as aforesaid, which thereby made holes in the bottom of the said plaintiffs' vessel, and destroyed the planks thereof, and the plaintiffs' said vessel then sank in the said channel, and was otherwise much broken, spoiled, damaged, and depreciated in value, whereby the said plaintiffs were deprived of their said vessel, and also lost and were deprived of all the advantages and profits to a large amount, to-wit: (\$20,000) twenty thousand dollars, which they might and would otherwise have derived and acquired from the use of the said vessel.

Third plea: And for a third plea as to the first count of the declaration, the defendant says, that before and at the time of the committing of the several grievances in that count mentioned, the said Dredge and anchor belonged to Her Majesty the Queen, represented by the Minister of Public Works for the Dominion of Canada, and the said harbour of Bathurst was one of Her Majesty's ports and harbours of the said Dominion, and was a navigable arm of the sea, and for the purpose of improving and preserving the said port and harbour, and the navigation thereof, Her said Majesty represented as aforesaid, employed the defendant, Alexander McIntyre, Edward Murtle, John McKenzie, and others as servants in the employment of Her Majesty represented as aforesaid; and the said defendant, Alexander McIntyre, Edward Murtle, and John McKenzie were then employed by the authority and directions of Her Majesty represented as aforesaid, and were using the said Dredge in digging out and removing obstructions to the navigation of the said port and harbour, and because it became necessary and proper for the convenient and proper working thereof, to anchor and hold the said Dredge, the said defendant in the course of his duty and employment as aforesaid, directed the said Alexander McIntyre, Edward Murtle, and John McKenzie, to put and fix the said anchor in the said harbour, when the said Alexander McIntyre, Edward Murtle, and John McKenzie some or one of them placed or fixed the said anchor in the manner alleged, in and by the said first count, without any knowledge on the part of the said defendant of the same being carelessly, negligently, improperly, or dangerously placed,

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or fixed, and the said defendant never placed or fixed the said anchor or caused the same to be placed or fixed otherwise than as above stated, and never knew before the said time, when, &c., that the same had been in any way negligently or improperly placed or fixed. And the said defendant in fact says that neither the said Alexander McIntyre, Edward Murtle, nor John McKenzie were in the defendant's employment, but they and the said defendant were fellow servants in the employ of Her Majesty, represented as aforesaid; which are the several grievances in the said first count mentioned.

June 17th. *Tuck, Q. C.*, (with whom was *Harrison*) in support of demurrer to declaration.

The harbour of Bathurst is a public harbour, and the defendant's putting the anchor there out of sight, is no negligence and affords no ground of action: *The Marpesia*.¹

It should be shewn by the declaration in what way the putting the anchor out in Bathurst harbour was illegal.

Kaye, Q. C., contra. The charge is: 1st. Putting the anchor in shallow water. 2nd. Leaving it there a long and unreasonable time. If an anchor is placed in shallow water, it is the duty of the master to put out a signal to warn vessels. The harbour is like a public highway. A person can use it for a reasonable time but not permanently: *Rex v. Cross*;² *Rex v. Jones*;³ *The Vianna*;⁴ *The Scioto*;⁵ *Brown v. Mallett*;⁶ *White v. Crisp*;⁷ *Submarine Tel. Co. v. Dickson*.⁸

Weldon, Q. C., follows on the same side and cites *Harris v. Mobbs*;⁹ *Jolliffe v. Wallasey Local Board*,¹⁰ p. 79, per Keating, J.

The declaration and pleadings are precisely the same—and the facts strikingly similar.

Tuck, Q. C., in reply.

This case is very different from a person stopping his carriage in a public highway, where he has no right to be. The Dredge has a right to remain in the harbour as long as the harbour master allows her to remain there, and it is the duty of masters of vessels to keep clear.

ALLEN, C. J. I think the declaration shows a sufficient cause of action. I had some doubts as to the third count, but I think it is sufficient.

If the anchor was dangerous to vessels navigating this har-

¹ L. R. 4 P. C. 212.

² 3 Camp. 224.

³ 3 Camp. 229.

⁴ Swab. Adm. R. 406.

⁵ Davis' Am. Adm. Rep. 260.

⁶ 5 C. B. 569.

⁷ 10 Ex. 212.

⁸ 15 C. B. N. S. 759.

⁹ 3 Ex. Div. 262.

¹⁰ L. R. 9 C. P. 62.

bour, defendant should have put a buoy there to warn vessels. The first count is quite sufficient. On the whole I think the third count is also sufficient.

WELDON, WETMORE and KING, JJ., concurred.

Judgment for the plaintiffs.

June 17. *Weldon, Q. C., and Kaye, Q. C.*, in support of demurrer to pleas. *Tort will not lie against the Crown: Musgrave v. Pulido*;¹ *Geddis v. Bann Reservoir*;² *Rex v. Russell*.³

A wrong has been done, and there must be a remedy: there is none against the Crown.

A person having the care and control of a vessel lying in navigable waters, although under the control of the government, is liable the same as the master of a merchant vessel, and is bound to exercise care so as not to endanger other vessels: *The Volcano*;⁴ *The Birkenhead*.⁵ The defendant admits by the pleas that he placed the anchor there, and kept it an unreasonable time.

Tuck, Q. C., (with whom was *Harrison*,) *contra*.

We say by our pleas that Lloyd was master of a Government vessel; and that he did not employ the mariners; that he knew nothing of the putting down of the anchor; and was not responsible for the acts of the men. They were appointed by the Crown the same as Lloyd himself was.

[ALLEN, C. J. Is there not a decision that the master of the king's ship is not responsible when the lieutenant is in charge?] Yes. We would refer to *Nicholson v. Mounsey*;⁶ *McBeth v. Allingham*;⁷ *Unwin v. Wolsley*; ⁸ *Broom's Leg. Maxims*, p. 582.

The pleas allege that these men were employed by the government, and that the acts complained of were their acts, over which the defendant had no control.

Weldon, Q. C., in reply. My learned friend has not brought this case within the principle of *Nicholson v. Mounsey*. The captain of a merchant ship does not necessarily employ the men. The pleas should show how the defendant directed the men to put out the anchor. We aver in the count that the anchor was put down by the defendant, and that he suffered and permitted it to be there, and that he did not put down a buoy.

Non constat but that these men were perfectly incompetent,

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¹ 5 App. Cas. 102.

² L. R. 3 App. Cas. 430.
³ 10 Ex. 437.

⁴ 2 Wm. Rob. 337.

⁵ 2 Wm. Rob. 51.
⁶ 10 Ex. 384.

⁷ 1 T. Rep. 172.

⁸ 1 T. Rep. 674.

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may not have been the proper persons. They did it by his orders.

[KING, J. Admitting they are all jointly employed to put out the anchor, can he excuse himself by saying he directed the men to do it?] No.

In *Nicholson v. Mounsey*, the lieutenant had the care and control of the steering. See per Grose, J., in that case. Having ordered the men how to fix the anchor the defendant is liable if they fixed it improperly.

Cur. adv. vult.

The judgment of the Court, (ALLEN, C. J., WELDON, WETMORE, and KING, JJ.,) was now delivered by

ALLEN, C. J. The 1st count of the declaration states that before the happening of the injury thereafter mentioned, a certain steam dredge belonging to the government of the Dominion of Canada, and of which the defendant was in possession, and had the management and control, was lying at anchor in the main channel of Bathurst harbour, where no obstruction to the navigation previously existed, and then being a public highway for ships and vessels to pass and repass, and along which vessels were accustomed to pass &c., without obstruction; the anchor of which steam dredge then lay in the said main channel with its fluke sticking upwards, under water and wholly concealed in such a position, and at such a depth that vessels in navigating and passing along and over the place where the anchor lay, would necessarily be in danger of striking against the same, and being injured. That the defendant permitted the anchor to remain so sunk in the channel and concealed, for an unreasonable time, without taking any precaution to prevent or guard against danger to vessels navigating in that part of the channel, and without placing any buoy or signal to give warning of the danger. That while the anchor was so lying the plaintiffs were lawfully possessed of a certain steamboat which was then lawfully navigating and passing along that part of the said channel, and not having any knowledge of the danger, and without any neglect or default on their part, or on the part of their mariners or servants, their vessel struck with great force against the said anchor, and was thereby greatly damaged and injured, insomuch that she sunk, &c.

3rd plea. That at the time of committing the alleged grievances, the dredge and anchor belonged to Her Majesty, the Queen, represented by the Minister of Public Works for the Dominion of Canada; that the harbour of Bathurst was one of the ports and harbours of the Dominion, and was a navigable arm of the sea; that for the purpose of improving the said port and harbour and the navigation thereof, Her Majesty, represented as aforesaid, employed the defendant, and Alex. McIntyre and others (*naming them*), as servants in the employ of Her Majesty; that they were using the dredge in digging out and removing obstructions to the navigation of the harbor, and it became necessary to anchor the dredge for the proper working thereof; that the defendant in the course of his duty and employment, directed the said Alexander McIntyre, &c., to put and fix the anchor in the harbour, when the said Alex. McIntyre, &c., some or one of them, placed or fixed the anchor in the manner alleged in the declaration, without any knowledge on the part of the defendant of the same being carelessly, negligently, or improperly placed or fixed; and he never placed or fixed the same, or caused it to be placed or fixed otherwise than as above stated, and never knew before the time when, &c., that it had been in any way negligently or improperly placed or fixed; and that neither the said McIntyre (nor the others named) were in the defendant's employment, but that they and the defendant were fellow servants in the employ of Her Majesty, represented as aforesaid.

We think this plea does not show any legal defence to the action. It admits that the defendant directed the men to put the anchor in the place where it was, in the channel; that it was in a dangerous position for vessels navigating that harbour, and that the plaintiffs' vessel struck upon it and was injured, without any neglect or want of care on their part. The defendant contends that he is not liable for the acts of McIntyre and the other men, because they were not employed by him, but by the government, and therefore were not his servants, and he relied on the case of *Nicholson v. Mounsey*,¹ to shew that under such circumstances, he was exempt from responsibility. But the ground on which the defendant in that case—the captain

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of a king's ship—was held not liable, was, that the injury to the plaintiff's ship was done during the watch of the lieutenant, who was upon deck, and had the actual management and control of the ship at the time, and when it was not the captain's duty to be on deck, nor was he in fact there. There was no personal interference of the captain with the act of the lieutenant, by which the danger was occasioned. Grose, J., said that if the captain had ordered the lieutenant to do the act, it would have been a different question. That case does not support the position taken by the defendant here; for although McIntyre and the other men who put out the anchor were not employed by the defendant, they were under his direction and control in the management of the dredge, and they put the anchor in the place where it did the injury by his express direction.

Having directed the men to put out the anchor in a place where it might be dangerous to navigation, it is no excuse for him to say that he did not know that it was negligently or improperly placed there.

The seventh plea to the third count is substantially the same as the third plea to the first count, and is equally defective.

Judgment for the plaintiffs.

CASES DETERMINED
BY THE
SUPREME COURT OF NEW BRUNSWICK
IN
MICHAELMAS TERM, XLV. VICTORIA.

KEENAN v. THE TRUSTEES OF THE LEINSTER STREET
BAPTIST CHURCH, ET. AL.

1881.

October.

Negligence—Where plaintiff offers no evidence to connect defendant with act of negligence—Effect of such evidence on cross-examination—How far plaintiff entitled to benefit of.

Where in an action for negligence the plaintiff offered no evidence to connect one of several defendants with the negligent act complained of, and the only evidence of such connection, and this very slight, was elicited from the defendant himself in cross-examination,

Held, that there should be a new trial, unless the plaintiff consented that a verdict should be entered for such defendant.

This was an action tried before Mr. Justice King at the Saint John Circuit in March last. The defendant trustees were the trustees of the Baptist Church on Leinster street in the city of Saint John; the defendant, Masters, was a member of the board of trustees, and the defendant, McGourty, was a contractor employed to open a drain across the sidewalk in front of the church. The place not being properly lighted, the plaintiff fell into the drain and was injured. The plaintiff offered no evidence to connect the defendant, Masters, with the digging of the drain, and the only evidence there was to connect him with the wrongful act which caused the plaintiff's injury, was brought out on his (Masters') cross-examination, where he said, "I think I probably directed Porter to get McGourty to open up the drain." The plaintiff had a verdict against all the defendants. No leave was reserved to enter a nonsuit.

October 19th. *C. H. Masters* moved for a new trial on the ground of misdirection of the learned Judge, in not directing the jury that there was no evidence against the trustees of the Leinster Street Baptist Church, or against the defendant, Masters.

Barker, Q. C., contra.

Masters, in reply.

Cur. adv. vult.

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 MORE, DUFF, PALMER, JJ.) was now delivered by
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 THE ALLEN, C. J. The plaintiff gave no evidence to connect Mas-
 TRUSTEES OF ters, with the digging of the drain, and he was therefore entitled
 OF THE LEIPSTER to have a verdict of acquittal entered for him at the close of
 STREET BAP- the plaintiff's case. Whatever evidence there was to connect
 TIST CHURCH. him with the wrongful act which caused the plaintiff's injury,
 was brought out on his cross-examination in the defendants'
 case. This evidence was so slight that I think there should be
 a new trial unless the plaintiff will consent that a verdict may
 be entered for Masters. The plaintiff to be allowed thirty days
 from this date to determine whether she will so consent.

Judgment accordingly.

1881.

McLEOD, ASSIGNEE, v. PYE.

October. *Award—Submission containing agreement that award may be entered
 as a postea—But silent as to its being made a rule of court—Ap-
 plication to make it a rule of court refused.*

Where by a submission containing no agreement that it might be made a rule
 of court, the parties to the suit agreed that the award could be entered as a
postea on the *nisi prius* record, and judgment be signed thereon, the court re-
 fused to make the submission a rule of court.

October 11, 1881. *Jordan* moved to make submission a rule
 of court. There was no agreement that the submission could
 be made a rule of court, but the parties agreed that the award
 could be entered on the *nisi prius* record as the verdict of a
 jury.

Cur. adv. vult.

The judgment of the Court, (ALLEN, C. J., WELDON, WET-
 MORE, DUFF, PALMER, and KING, JJ.,) was now delivered by
 ALLEN, C. J. This was an application to make a submission
 to arbitration a rule of court. The submission was by agree-
 ment, under the hands of Ezekiel McLeod, assignee of R. S. and
 J. S. B. DeVeber, of the one part, and John L. Pye of the other
 part; and after reciting that a suit, arising out of matters of
 account between the parties, was then pending in this Court,
 wherein McLeod, as such assignee, was plaintiff, and Pye was
 defendant, it was thereby agreed to refer all matters of account

between them to Duncan Robertson, Esquire, subject to the decision and judgment of the Judge of the County Court of Saint John, upon all questions of law arising out of the said arbitration, and concerning such accounts.

1881.

 McLennan
v.
Pye.

The submission contains the following clause: "And it is further agreed by and between the said parties hereto, that the award so made by the said Duncan Robertson, subject to the decision of the said Judge of the County Court may be entered as a *postea* upon the *nisi prius* record, in the said suit now pending between the said parties, and that judgment may be signed and duly entered up of record upon such *postea* in the said suit." But it did not contain any agreement that the submission might be made a rule of court.

The effect of the provision for entering the award upon the *postea*, is only at most to substitute the award of the arbitrator for the verdict of a jury; and it leaves the party in whose favor the award is made to enforce his remedy upon it by judgment and execution in the ordinary way. But if the submission is made a rule of court, an extraordinary remedy is given, by attachment for contempt. The Consolidated Statutes, ch. 37, (sections 181-184) have no application to this case. It is only under the Stat. 9 and 10 Wm. 3, ch. 15, that the power to proceed by attachment can be obtained. In *Doe v. Murray*,¹ that Statute was held to be in force in this Province, and it has been constantly acted upon ever since.

It however requires that the parties to the submission shall expressly consent and agree to its being made a rule of court; and that the agreement to that effect shall be *inserted in the submission itself*, or in the condition of the bond, or promise, whereby they oblige themselves, respectively, to submit to the award. As to what is a sufficient consent under the Statute, see Russell on Awards, (3rd ed.) 59.

As there was no such consent here, the motion must be refused.

Motion refused.

¹² Kerr, 359.

1881.

HAMILTON ET AL. v. DUNPHY.

October.

DUNPHY APPELLANT v. HAMILTON ET AL. RESPONDENTS.

*Appeal on questions of fact—Verdict set aside by County Court Judge
—Interfering with judgment of County Court.*

On an appeal from an order of a County Court Judge granting a rule for a new trial on the ground of the verdict being contrary to evidence, the Court (ALLEN, C. J., and WELDON, WETMORE and DUFF, JJ.) refused to interfere with the decision of the Court below.

*Hilland v. Hamm*¹ and *Sheraton v. Whelpley*² approved.

This was a case tried before the Northumberland County Court where a verdict was found for the defendant for eighteen dollars and forty cents on a plea of set off. The plaintiffs thereupon moved for a new trial on the following grounds: 1st. That the verdict was contrary to the weight of evidence. 2nd. That it was contrary to the Judge's charge. 3rd. That it was perverse. The County Court Judge ordered a new trial and the defendant appealed.

October 21st. *Geo. F. Gregory* in support of the appeal. [DUFF, J. refers to *Hilland v. Hamm*.³] If the Judge of the Court below had sustained the verdict the case would be different, but in this case the Judge has wrongfully disregarded the finding of the jury upon a question of fact: *Gray v. Turnbull*.⁴

E. L. Wetmore contra. There was clear evidence of an account stated on which the jury should have found for the plaintiffs. The judgment of the County Court Judge was right and this Court should not interfere with it except under extraordinary circumstances.

Gregory in reply.

Our. adv. vult.

The judgment of the Court (ALLEN, C. J., and WELDON, WETMORE and DUFF, JJ.) was now delivered by

ALLEN, C. J. This case was tried in the County Court of Northumberland, and a verdict given for the defendant (Dunphy.) The Judge of the County Court granted a new trial on the grounds—1st. That the verdict was against the weight of evidence; 2nd. that it was contrary to his charge; and 3rd. that it was perverse.

There is certainly nothing to sustain either the second or

¹ 1 P. & B. 299.
² 4 P. & B. 75.

³ 1 P. & B. 299.
⁴ L. R. 28a Ap. 52.

third grounds on which the new trial was granted, as the case was left to the jury to find for either party, according to the credit to be given to their respective witnesses. Then, as to the verdict being against the weight of evidence—this also depends upon the credibility of the witnesses. If the appellant's evidence was true, he was entitled to credit from the respondent for a raft of logs, and the verdict in his favor was right. If, on the other hand, the evidence of Hamilton and his attorney, and McLaughlin (particularly the latter) gave the true account of what took place, the verdict should have been for the plaintiffs below. If the number of witnesses is to have any influence in determining whether a verdict is against evidence, certainly this verdict was so, for the appellant was not supported by any witness, in his account of what took place respecting the delivery of the raft, and about his refusal to give a note for the balance claimed by the respondents. But I have had some doubts whether, in a case depending entirely on the credibility of the witnesses, the verdict should have been set aside as against evidence—whether, if the case had been tried before a Judge of this Court, a new trial would have been granted. Where the evidence is conflicting, a new trial will seldom be granted unless the evidence against the verdict very strongly preponderates: *Mellin v. Taylor*;¹ *Lacey v. Forrester*.²

1881.

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In *Belcher v. Prittie*,³ Tindal, C. J., said:—

“Where a case involves not matter of law, but that which is purely a question of fact and that fact has been submitted to those whom the law has constituted the *judices facti*, we are not at liberty to take away from the party the right which he has acquired from the mouth of the jury, though we may entertain some degree of doubt whether they have come to a right conclusion. Before we send the party down again, we ought to perceive, if not with moral certainty, at least with a degree of clearness approaching to it, that the jury have done wrong.”

In *Wortman v. Marter*,⁴ where the case depended upon the testimony of one witness, and the jury found a verdict against his evidence, the court, refusing a new trial said, “There is, perhaps, no question so peculiarly appertaining to the province of a jury as the credibility of witnesses, and where

¹ 18 Bing. N. C. 100.
² 33 Dowl. 289.

³ 10 Bing. 414.
⁴ 43 Allen 309.

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HAMILTON
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such a point has been properly left to them, the court will not disturb a verdict on the ground that they should have come to a different conclusion." In *Hilland v. Hamm*,¹ the Court affirmed that principle, and refused to set aside the decision of the Judge of the County Court, sustaining the verdict, though we should have come to a different conclusion on the evidence. *Sheraton v. Whelpley*,² turned on the same principle. *Smith v. Andrews*,³ did not depend upon the credibility of the witnesses alone. If it had, the Court admitted there would have been no ground to disturb the verdict. *Doane v. Doane*,⁴ was a very peculiar case and is quite distinguishable from the present case.

No doubt the Judge of the County Court, who heard the evidence and could judge of the manner in which the witnesses gave their testimony, had the opportunity of forming an opinion as to the weight of the evidence, which we do not possess, and I admit, that as a general rule, we ought not to interfere with his decision on slight grounds. I am unable however, entirely to satisfy myself that this was a case in which a new trial should have been granted; but as the other members of the Court who heard the argument do not participate in my doubts, the appeal will be dismissed.⁵

Appeal dismissed.

1881.
October.

ABBINETT v. THE NORTH-WESTERN MUTUAL LIFE INSURANCE COMPANY.

Contract—Parties to—Policy of insurance—Beneficiary not entitled to bring action in her own name.

By a policy of insurance on the life of the husband, effected by him for the benefit of the plaintiff, his wife, the defendant company agreed to pay the sum assured to the plaintiff, or her executors, administrators, or assigns, and in the case of her death in his lifetime, to his executors, administrators, and assigns. By his application for the insurance the husband agreed that his answers to certain questions should form the basis of the contract, and he agreed to pay the premiums.

Held, (by ALLEN, C. J., WETMORE, DUFF, and KING, JJ., WELDON, J., dissenting), that the plaintiff could not maintain an action on the policy in her own name.

This was an action on a policy of insurance, tried before Mr. Justice Wetmore, at the Albert Circuit, July, 1880. The de-

¹ 1 P. & R. 299.
² 4 P. & R. 75.

³ 1 P. & R. 541.
⁴ 1 P. & R. 539.

⁵ Palmer and King, JJ. not having heard the argument took no part.

fendant company by their policy, in consideration of the representations made in the application, and of the premiums paid and to be paid every year during the continuance of the policy, undertook to assure the life of George A. Abbinett, for the benefit of his wife, Amanda Abbinett, in the sum of \$1000. George A. Abbinett was the applicant for the insurance, and answered in writing a number of printed questions as to his age, health, occupation, etc., which statements he agreed should form the basis of the contract with the company. He also undertook to pay the premiums. By the policy the company undertook to pay the sum assured to the wife, her executors, administrators or assigns in case she survived her husband, and in case she died first, then to his executors, administrators or assigns. The husband having died, his widow, the plaintiff, brought this action. The plaintiff had a verdict, leave being reserved for the defendant company to move to enter a nonsuit.

June 17 and 18, 1881. *C. A. Macdonald* moved to have a nonsuit entered, on the ground, among others, that the plaintiff was not a contracting party, sole beneficiary or party to the consideration. He cited on that point *Dicey on Parties*, 81; *Price v. Easton*; ¹ *Tweedle v. Atkinson*; ² *The Maritime Bank v. The Guardian Assurance Company*.³

D. L. Hanington, contra, on that branch of the case, admitted that generally the action must be brought in the name of the party to the contract. In marine insurance it was different, because there the policy was for the benefit of all concerned, but he contended that this policy, being for the benefit of the wife, the Court should hold that it was effected by the husband as her agent; that the contract was substantially with her. This case was very different from the *Maritime Bank v. The Guardian Assurance Company*. A person cannot insure property in which he has no interest, but a wife can effect insurance on the life of her husband. This insurance could not have been of any benefit to Geo. Abbinett. It was for the benefit of his wife. The contract was in effect that the widow could sue, and the company by the contract are estopped from denying her right.

Barker, Q. C., in reply. The well established rules must be

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¹ 4 B. & Ad. 423.² 1 B. & S. 308.³ 3 P. & B. 297.

1881. followed in this case. The American authorities are conflicting and the Ontario cases, which would appear to support the plaintiff's contention, were decided under an Act giving the beneficiary the right to bring the action: *Tweddle v. Atkinson* is in point. The question is, from whom did the consideration proceed? Certainly from George A. Abbinett. He is the contracting party. He paid the premiums. His executors are trustees for the beneficiary.

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Our. adv. vult.

The following opinions were now delivered:—

ALLEN, C. J. This is an action on a policy of insurance made by the defendants, by which they undertook, in consideration of the representations made in the application, and of the premiums paid and to be paid every year during the continuance of the policy, to assure the life of George A. Abbinett, for the benefit of his wife, Amanda Abbinett, in the amount of \$1000.

George A. Abbinett was the applicant for the insurance and answered in writing, a number of printed questions, as to his age, health, occupation, etc., which statements he agreed should form the basis of the contract with the company. He also undertook to pay the premiums.

The policy contained the following clause:

"And the said company doth hereby promise and agree to pay the said sum assured, to the said beneficiary, or her executors, administrators, or assigns, in sixty days after due proof of death of the said person whose life is hereby assured. In case of the death of the beneficiary before or at the time of the death of the person whose life is assured, the amount of the assurance shall be payable at maturity to the executors, administrators, or assigns of the said person whose life is assured."

The action was brought by the widow of George A. Abbinett, the beneficiary named in the policy; and one of the questions reserved on a motion for a nonsuit, was whether the action should not have been brought by the representatives of her husband.

The right of the plaintiff to maintain this action, must depend upon whether she was a party to the contract, and whether the consideration for the defendant's promise moved from her. Both these questions must be answered in the negative.

The agreement by the company to pay the sum insured to the plaintiff, was not an agreement *with her*, but with her hus-

hand, the assured, to pay the amount to her when it became due. On such a contract, the right of action on the death of the husband vested in his representatives, and not in the beneficiary. *Price v. Easton*,¹ and *Tweddle v. Atkinson*,² decide that a stranger to a contract cannot sue upon it, though made for his benefit.

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It is unnecessary to consider any of the other objections taken, as this one is fatal to the maintenance of the action.

WELDON, J. This cause was tried at the Albert Circuit, in July, 1880, before Mr. Justice Wetmore, and a verdict found for the plaintiff on a policy of insurance, dated May 17, 1877, upon the life of G. A. Abbinett, for the benefit of his wife, the plaintiff in this suit, for the sum of \$1000 for the term of his natural life. The said defendants agreed to pay the said sum insured to the beneficiary or her executors or administrators in sixty days after proof of death of the said G. A. Abbinett. In case of the death of the said beneficiary, then the said sum of \$1000 was to go to the person whose life was insured, his executors, or administrators. The said G. A. Abbinett died in July, 1877; proof of his death was delivered to the defendants in January, 1878; and this action was commenced in the May following. The defendants plead several pleas: the plea upon which the defendants rely, being that there was no existing policy, and the defendants contend that the plaintiff cannot maintain the action, she, neither being a contracting party, sole beneficiary, nor a party to the consideration.

In regard to the first point,—the policy was made out and signed by the company and countersigned by their agent, and left with Cushing & Clark, who paid the company the premium. To this question, the jury answered, it was duly issued, the premium paid the company by Cushing & Clark was the premium on the said policy.

The other question, or rather objection, is more difficult of solution.

It is quite clear the deceased intended to make provision for his wife, and he had his life insured with that view. The company met his wishes by undertaking to pay the plaintiff in case she survived her husband, her executors, or administra-

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tors. She does survive him, and is by the contract, entitled to the money.

I am of opinion the agreement was made by the defendants to pay to the wife, and not any one else, in case she survived her husband—the policy of insurance is very clear in its terms—no other person can sue upon this promise and undertaking. The language used in this contract of insurance is very different from that in *The Maritime Bank v. The Guardian Assurance Company*,¹ where the promise was to pay the assured. In this case the defendants, in consideration of a sum paid them, promise to pay the plaintiff the insurance money, in case she survive her husband, her executors or administrators, and, only in case of her dying before him, to his executors.

Under this contract, there is no one authorized to sue; the representatives of the party who paid the premium could not recover the amount; they are precluded by the contract from doing so, unless the plaintiff dies in the lifetime of the husband. And by the terms of the policy it is expressly declared to be made payable to the plaintiff, and no other person can sue upon it, if she survive her husband. And the law will presume that, if nothing appear to the contrary, that every person accepts that which is for his benefit. This policy was made for her benefit, and she accepts it. How can any other person take it? There is no undertaking in the policy to pay any one but the wife, in case she survived her husband, and she is the only one who can sue. The administrators of G. A. Abbinett could not sue the defendants (see *Anderson, Adm. v. Martindale*²), if the plaintiff survive her husband, the said G. A. Abbinett.

As to the objection that the contract was only made between the husband and the defendants; while such a contract was made there is an express promise and undertaking by the defendants that, in case of the death of her husband, they will pay the said sum of \$1000 to the plaintiff, her executors or administrators, and only in case of the death of the wife, during the lifetime of the husband, do they undertake to pay the husband's executors or administrators. In *Burnham v. Watts*,³ Chipman, C. J., in giving judgment on demurrer, says:—

¹ 3 P. & B. 300.

² 1 East. 497.

³ 2 Kerr 377.

"The principal objection made to this declaration is, that there is no consideration moving from the plaintiffs. But an express promise is laid to pay the plaintiffs, and for a consideration which clearly imports a benefit to the defendant. It is said by Mr. Justice Story in his book on Agency, p. 407, (n), that if there be a consideration for a promise, it does not seem material from whom it comes: and this we apprehend to be the true doctrine on the subject."

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I am unable to arrive at the conclusion that, after an express promise by the defendants to pay the plaintiff, after her husband's death, a sum of money, for a consideration paid to the defendants, they should not pay the plaintiff, according to their undertaking so expressed,—they deriving a benefit from the husband.

I regret to differ from my brethren upon this case, but I am unable to bring my mind to the conclusion that defendants are not bound by force of their policy to pay the plaintiff.

WETMORE, DUFF and KING, JJ., agreed with the Chief Justice.¹

Nonsuit granted.

EX PARTE WOODWARD.

1881.

Judge's Order—Discharging a person in custody under a warrant of a magistrate—Made ex parte in a summary way—No lawful authority for making such order.

November.

Held, (by WETMORE, DUFF, PALMER, and KING, JJ., WELDON, J. dissenting) that a Judge of the Court has no power on the application of one in custody, under a warrant of commitment made by a magistrate in due form of law, to make an *ex parte* order, in a summary way, for the prisoner's discharge. The prisoner must proceed by writ of *habeas corpus* or by proceedings under chapter 41 of the Consolidated Statutes.

This was an application to set aside an order made by Mr. Justice Weldon whereby he ordered the keeper of the common gaol of York County, to forthwith discharge one Thomas Hackett from his custody. On the 16th of February Hackett, on the complaint of John Woodward was convicted before the police magistrate of Fredericton of selling intoxicating liquors in contravention of "The Canada Temperance Act, 1878." This was the second offence, and he was adjudged to pay a fine of \$100.00. No goods and chattels whereon to levy, being found, on the 24th of February, the magistrate issued a warrant of commitment against Hackett and delivered it to Christie,

¹Palmer, J., not having heard the argument took no part.

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a constable. On the same day, on the application of Hackett, an order *nisi* for a certiorari to remove into this Court the proceedings before the magistrate was made by Mr. Justice Weldon. This order contained a stay of proceedings. A copy of the order was served on Woodward on the 25th, on the magistrate on the 26th, after the constable had arrested Hackett, and on the constable on the same day and after he had arrested Hackett but before he delivered him into the custody of the gaoler. Mr. Justice Weldon, on the same day (February 26th) made the order for Hackett's discharge.

A rule *nisi* having been obtained in Hilary Term to set aside the order made by Mr. Justice Weldon, on

October 25th, 1881, *Rainsford* shewed cause. He contended that the arrest and imprisonment was a contempt of Court, and the Judge had power to order Hackett's discharge.

Lugrin in support of the rule, referred to Paley on Convictions, 446, and *Reg. v. Nash*.¹ The warrant had issued to the constable before the order was served and he was bound to execute it. The prisoner should have applied by writ of *habeas corpus* or for an order under chapter 41 of the Consolidated Statutes.

Cur. adv. vult.

The following opinions were now delivered:—

ALLEN, C. J.,² read the opinion of DUFF, J., with which WETMORE, PALMER, and KING, JJ., agreed.

This was a rule obtained in Hilary Term last to set aside an order made by Mr. Justice Weldon on 26th Feb'y last, whereby on reading the affidavit of Thomas Hackett, and that of Charles W. Tabor, he ordered "the keeper of the common gaol of the County of York to forthwith discharge the said Thomas Hackett from out of his custody," so far as related to the confinement under a certain warrant of commitment made by J. L. Marsh, Esquire, police magistrate of Fredericton.

The facts, as they appear from the affidavits read before us are as follows: On the 16th Feb'y last, Hackett, on the information of Woodward, was convicted before Mr. Marsh of having sold intoxicating liquors contrary to the provisions of the

¹ 11 Salk. 147 and 2nd Ed. Raymond, 989.

² ALLEN, C. J., not having heard the argument took no part.

"Canada Temperance Act, 1878," and this being a second offence, he was adjudged to pay a fine of \$100. The fine not having been paid, the magistrate, a day or two after the conviction, issued a distress warrant in the usual form, against the goods and chattels of Hackett, and delivered it to Christie, a police constable, for execution. On the 24th Feb'y, Christie, after diligent search, being unable to find sufficient goods or chattels whereon to levy the amount of the fine, made a return to that effect on the warrant; and on the same day (24th Feb.), the magistrate delivered to Christie a warrant of commitment against Hackett, under which warrant, Christie, on the 26th Feb'y, arrested Hackett and committed him to the gaol.

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On the 24th February an order *nisi* for a *certiorari* had been made by Mr. Justice Weldon to remove the conviction against Hackett into this Court, a copy of which order was thereby directed to be served on Woodward; and the order in its terms, was made a stay of proceedings. Whether or not the order *nisi* had been actually made before the magistrate handed the warrant to the constable, does not appear; but certainly the magistrate had not then been served with it, or had any notice of it. The affidavits show that it was not served on Woodward until the 25th Feb'y, nor on the magistrate until the 26th, after Hackett had been arrested under the warrant, and was actually in the custody of the constable. It would appear, however, from the affidavit of Mr. Tabor, that he heard Woodward say he had shown the magistrate, the day previous, (25th Feb'y,) the copy of the order *nisi*, which had been served on himself.

It is clear, from these affidavits, that at the time Mr. Justice Weldon made his order of date 26th Feb'y, Hackett had not only been arrested under the magistrate's warrant, but was actually imprisoned in the gaol; and, in my opinion, the only mode in which he could proceed to obtain his discharge therefrom was by *habeas corpus*, or by an order under chap. 41 of the Consol. Statutes. He was in custody then, under a warrant of commitment, made by a justice of the peace in due form of law. Under such circumstances I know of no authority which a Judge of this Court or of any Court, has, upon an application of the prisoner himself, and in this summary way, to make an

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ex parte order for his discharge. The case is very distinguishable from that of a witness who is arrested for debt, whilst attending court to give his testimony. There, the person arrested is not in custody by virtue of any warrant of commitment issued by a magistrate in the discharge of his judicial duties, but by the direction of the plaintiff in the cause, or the person at whose instance the *capias* or execution was issued. The facts are all referred to Court at *nisi prius*; and the presiding Judge sees the process under which the arrest is made, and is cognizant himself of the fact that the person arrested is a witness. Under these circumstances, the administration of justice demands that the witness shall be protected by the Court from arrest.

Again, it is said that the magistrate has committed a contempt of this Court by proceeding after Mr. Justice Weldon made his order *nisi* for a *certiorari* on the 24th Feb'y. If he did, I fail to see how it will help this order. This is not a proceeding to punish Mr. Marsh for contempt, but to effect the defendant's discharge from custody. But under the facts, as disclosed in the affidavits, I am not prepared to admit that he was guilty of any contempt of Court. It does not any where appear that the order *nisi* was made before the magistrate delivered the warrant to the constable for execution. See Paley Conv., 446; *Reg. v. Nash*.¹ And it certainly was not served on the magistrate until after the warrant had been executed. Hawk. Pl. C. book II. ch. 27, sec. 62; and book II. ch. 22, sec 28, are authorities which seem to show that the Justice is only liable for contempt for any proceeding after the *certiorari* itself is served upon him. Surely he cannot be treated as in contempt for disobeying an order *nisi* for a *certiorari* before he saw the order.

I am of opinion that the rule must be made absolute to set aside Mr. Justice Weldon's order of 26th February, 1881.

WELDON, J. A rule *nisi* was obtained in this case to set aside an order which I made, discharging Thomas Hackett, from the custody of the constable, James A. Christie.

It appeared a conviction was made on application of John Woodward against Thomas Hackett, by the police magistrate

¹ 11 Salk. 147, 2nd Ed. Raymond, 989.

of the city of Fredericton. A warrant was issued by the police magistrate, given to John Woodward, the complainant who placed it in the hands of James A. Christie, a constable, on the 25th Feb'y, 1881. The constable, on the following day, (26th), executed it. Previous to its being executed, an application had been made to me, on the 24th day of Feb'y, for a rule *nisi* for a *certiorari* to remove the conviction had before the police magistrate, with a stay of proceedings in the matter. A copy of the order was served on John Woodward, the complainant, and also upon the constable, Christie, before he had committed the prisoner, Hacket. In disregard of the order for rule *nisi* for *certiorari*, with stay of proceedings, the constable executed the warrant. Upon these facts appearing, I made an order discharging the defendant, Hacket, from custody, the proceedings of the constable being in violation of and in contempt of the rule *nisi* staying proceedings. The question was not mooted, that the rule *nisi* with stay of proceedings for a *certiorari*, was not regular, the Judge, as delegate of the Court, having power to grant the rule with stay of proceedings: *Reg. v. Newton Ferrers*,¹ *Ex parte McNeil*.² The rule, then, being properly granted, the applicant, Woodward, and the constable having the rule *nisi* served on them, it was a contempt of the order of Court to proceed further, after such notice and order of the Judge, properly made, for the discharge of Hacket, in the same manner as if the Court was sitting.

I do not agree with my brother, Duff, that it was as against the police magistrate a contempt of the order. The police magistrate had issued his warrant before any rule *nisi* for a *certiorari* with stay of proceedings had been served upon him. It was out of his hands, and in the hands of the constable, upon whom the rule was served, and also on the applicant, Woodward. They should have obeyed the order. I am of opinion I had power to order the discharge of the party, Hacket. It was a suspension of the warrant until the matter contained in the conviction was inquired into, and was sustained or quashed. All proceedings on such conviction were in abeyance. I am, therefore, of opinion the order of discharge was rightly made.

Rule absolute to set aside order.

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¹ 19 Ad. & El. 32.

² 3 All. 498.

1881.

MACLELLAN v. BARNES.

October.

*Taxation of costs—On a day other than that appointed for taxation—
Review of taxation.*

Where it appeared that the clerk, by his appointment to tax costs obtained by the plaintiff, appointed the 8th as the day for the taxation, and the costs were not taxed until the 10th, and it did not appear that the defendant was represented at the taxation, and no explanation was given of the taxation taking place on a day later than that appointed, the Court made absolute a rule to review the taxation.

June 23, 1881. A rule *nisi* having been granted in a former term for a review of the taxation of costs on the ground that the appointment was for the 8th of February and the taxation was had on the 10th, the defendant not being represented at the taxation,

T. C. Allen now shewed cause, and *W. Puseley, jr.*, supported the rule.

Cur. adv. vult.

The following opinions were now delivered :

ALLEN, C. J. I think there should be a review of the taxation in this cause, on the ground that the defendant had not an opportunity of being present at the taxation.

WELDON, J. In this case the clerk appointed a time for the taxation of the costs on the discharging of a rule. The notice and copy of the rule and appointment were served on the defendant, but no costs taxed on the day for which notice had been given. The taxation on a different day was not regular. No attachment would be granted upon such a taxation. This has already been decided (see 3 P. & B. 590). It would therefore be necessary for the plaintiff to obtain another appointment by the clerk, and give the opposite party due notice before the taxation, to make it regular. If such is the case are not these costs irregularly taxed? I am of opinion they are. There should be a new taxation, appointment by the clerk, and notice and taxation there under.

The rule ought to be made absolute without costs.

WETMORE, DUFF and PALMER, JJ., concurred. KING, J., having been counsel in the cause took no part.

Rule absolute to review taxation.

EX PARTE BOLSTEAD.

1881.

October.

Chatham Police Act, 22 Vic. c. 46 and 26 Vic. c. 40—Appeal under 11 Vic. c. 12—When Court will not interfere in the decision of Justice.

Where, on appeal under 11 Vic. c. 12 from a conviction before a justice, the evidence was conflicting the Court refused to interfere with the decision of the justice.

The defendant was convicted under 22 Vic. c. 46, as amended by 26 Vic. c. 40,¹ of interfering with a police officer in the discharge of his duty as a policeman, and fined \$10 and \$16 costs. The defendant appealed to Mr. Justice Weldon, who referred the matter to the Court.

October 14, 1881. *Geo. F. Gregory*, in support of the appeal, contended that the conviction was bad for the following reasons: 1st. That there was no evidence of the officer being in discharge of his duty; 2nd. That there was no proof of the assault or interference other than the evidence of the officer himself. He referred to *Gray v. Turnbull*;² *Jones v. Calkin*;³ *Taylor on Ev.*, ss. 111, 112, 113; *Corbet v. McCracken*.⁴

E. L. Wetmore contra. If this is not a clear case of the innocence of the defendant this Court will not interfere with the finding of the Court below.

Gregory in reply.

ALLEN, C. J. While there was evidence that would justify the magistrate in dismissing the charge, I think there was also evidence to justify the conviction, and the evidence in favor of the defendant is not so overwhelming as to justify us in interfering with the decision of the Court below. There is nothing in the other points.

WELDON, J. I am of the same opinion. There is clear evidence to support the decision of the magistrate, and I think we should not interfere with it.

WETMORE, J. I am of the same opinion.

DUFF, J. I agree with the Chief Justice. I think there was evidence to justify the conviction.

PALMER, J. I agree that we ought not to interfere in this case. Had the evidence all been in favor of the defendant, I

¹ By 26 Vic. c. 40 section 37 of 11 Vic. c. 12, with other sections, is made to apply to proceedings under the former Act. 11 Vic. c. 12, s. 37, provides that "In every case of summary order or conviction . . . any person who shall think himself aggrieved by such order or conviction may appeal to the Supreme Court in banc or to any Judge thereof."

² L. R. 3 Ex. Ap. 63.

³ 3 Puga. 373.

⁴ 2 P. & B. 157.

1881. think we would be bound to quash the conviction. On appeal, I think the question can be tried over again, and I think it perfectly right that it should be so. I think proper weight should be given to the presumption of innocence; but against that presumption we have the judgment of the Court below, and we must also give due weight to that. There was evidence both ways, but I think an interference was proved. I think any person has a perfect right to interfere with a policeman who is exceeding his duty.

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KING, J. The evidence shews that the prisoner was in custody of a policeman, and that he was committing an offence for which he was liable to arrest. The question therefore is, whether the policeman was exceeding his duty and the defendant had a right to interfere; and 2nd, whether there really was any interference? On both the evidence is conflicting, and while I would not hesitate to quash the conviction, if the evidence was greatly in favor of the defendant, I do not think we should do so in this case. I agree with the Chief Justice.

ALLEN, C. J. I think there is no evidence that the policeman was exceeding his duty, and I think it unnecessary to express an opinion as to the right that any person has to interfere with a policeman. This Court thinks the appeal should be dismissed with costs, but as the matter was referred by Mr. Justice Weldon for advice, the case will go back to him to make the order.

Judgment accordingly.

1881. EDWARDS, CITY TREASURER OF FREDERICTON, v. BURGOYNE.

October. *Public Market—Grant of public market place—Whether authorizes establishment of market—11 Vic. c. 61, 14 Vic. c. 15, 22 Vic. c. 8, 30 Vic. c. 37 considered—Whether York County Council or City Council of Fredericton have control of the Queen's Ward Market—Imposing tolls or closing market without express authority—Repeal of Acts.*

The grant of a piece of land for a public market place authorizes the grantee to establish a market there.

Prior to 1848 the title to the market house in Queen's Ward, in the city of Fredericton, was in the justices of York County, who had power to make regulations for the management of the market. By 11 Vic. c. 61, s. 40, all power which the justices of York had to make regulations upon any subject within the city, was vested exclusively in the City Council. The Act 11

Vic. c. 61 was repealed by 14 Vic. c. 15, and this Act by 22 Vic. c. 8. Section 40 of 11 Vic. c. 61 was not re-enacted, but by the 4th section of 14 Vic. c. 15, "the whole legislative power and government of the city" was vested in the City Council, "and in no other power or authority whatsoever." By the 54th section of 22 Vic. c. 8, "the sole power and authority" to make bye-laws for various purposes within the city—one of which was the regulation of markets—was re-affirmed. On the incorporation of York County the powers of the justices were transferred to the County Council of York, and the title to the market house became vested in the County Council.

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Held, that the control and management of the market was in the City Council of the City of Fredericton.

In the absence of express authority to do so, the City Council of the City of Fredericton has no power to close the market, or to impose tolls on the sale of articles in the market house, the market by the grant being a free market.

The repeal of an Act by which it was declared that the market should be free, had not the effect of a legislative declaration that the market in question should not be a free market; but, except for matters done under the Act left the market as though the Act had never existed.

By 30 Vic. (1866) c. 37, s. 3, it is provided that the "City Council" of Fredericton, "shall have power, as heretofore, to impose tolls and rates, and may if they see fit, sell and dispose or otherwise farm the tolls and rates arising from the wharves, markets," etc.

Held, that this did not authorize the City Council to close the market, which by the grant creating it was free, or to impose tolls on articles sold in the market.

This matter was referred to the Court, by the Chief Justice, who, on the hearing of the matter before him, delivered the following judgment:—

This is a review of the conviction of the defendant before the police magistrate on a charge of selling butter in Fredericton at a place other than in the public market, contrary to the city bye-law.

The object of the prosecution was to determine whether the City Corporation has any and what control over the market in Queen's Ward, and over the persons exhibiting meat, etc., for sale there.

In considering this question, it will be convenient to review the history of the Queen's Ward market, and the title under which the property is held.

As early as the year 1789 there appears to have been a market house in Fredericton, and market regulations to have been made by the sessions.

In October, 1813, a license was granted to James Taylor, by the Governor and Council to occupy for twenty-one years a portion of the land in Fredericton then reserved for public uses (and which comprised the land where the present county court house stands), and to erect thereon a building for a public market house, where provisions could be brought and exposed for sale. Under this authority, Mr. Taylor erected a building for a public market on the site of the present county court house.

In November, 1815, a number of the inhabitants of Fredericton petitioned the Governor in Council to establish a market in the town, and on the 27th of November in that year a grant passed under the great seal, granting, appointing, and declaring that thereafter, for the term of twenty-one years from that date, there should be a market

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erected and established in the town of Fredericton, to be held and kept in front of block No. one in the town between the street and the river Saint John, so as to include the market house already erected there, and a space of sixty feet in breadth on each side thereof, extending from the said street to the said river, in every day in the week except Sunday, for buying and selling victuals and provisions of all kinds.

In November, 1816, a committee of the sessions was appointed to examine the market house, and to ascertain what the proprietor, Mr. Tayler, would dispose of it for, to the county for a county court house. The committee examined the building and communicated with Mr. Taylor as to the terms of sale, which they reported to the sessions, who agreed to purchase the building for £1,400, provided a grant of the land could be obtained to the justices of the county, in perpetuity, and for this purpose a petition was ordered to be presented to the Governor.

A petition was accordingly presented to the Governor, and on the 17th January, 1817, an order in council was made for a grant of the land to issue to the justices of the county.

This grant, which bears date the 21st February, 1817, recites that James Taylor, by the license and permission of the Governor in Council, had erected a building for a public market on the ground therein-after described; that the Crown, by letters patent, bearing date the 27th November, 1815, had erected and established a public market to be held at the same place, for the sale of victuals and provisions of all kinds; that the justices of the county, having found the upper story of the said building suitable for a county court house, had agreed with the said James Taylor for the purchase thereof, and had petitioned the Governor for a grant of the lands; and it then grants as follows: "Therefore know ye, that we, of our special grace, have given, granted, and confirmed, and by these presents for us, our heirs and successors, do give, grant and confirm unto the said justices of the peace for the county of York for the time being the same piece of ground, being all that piece or parcel of land on which the said market house now stands, lying in front of block number one in the town plot of Fredericton, and bounded as follows, viz.: southwesterly by the northeasterly line of the front street of the said town plot, (which street measures four rods in breadth): northeasterly by the waters of the river Saint John: and northwesterly and southeasterly by lines parallel to the sides of the said market house and sixty feet distant therefrom: the said piece of land measuring in width, in the whole, one hundred and fifty-two feet, and containing two roods and thirty-four perches, being particularly marked on the plot or plan hereunto annexed of the survey thereof made under the direction of our Surveyor-General; saving and reserving that part of the same land between the northeast end of the said market house and the margin of the bank of the said river, the whole width of the land hereby granted, which we do hereby declare is to be left open and unincumbered, and used as a public highway forever: To have and to hold the said piece or parcel of land, with the appurtenances thereunto belonging, saving and reserving, as

aforesaid, unto the said justices of the peace for the county of York, for the time being, forever: In trust, nevertheless, for the public uses following to wit,—the lower floor of the said building, or of any other building which may at any time hereafter be erected on the same site should the present be destroyed, and all other the land and premises hereby granted, for a public market place; and the upper floor of the same, or any other buildings as aforesaid, for the purpose of a county court house forever; and to and for no other use, intent or purpose whatsoever: this grant being nevertheless on this express condition:—That if the said justices of the peace for the said county, for the time being, shall at any time hereafter permit or allow any tavern, inn, or ale-house to be kept in any part of the present or any other building or buildings erected or to be erected on the land hereby granted, or any wine, rum, brandy, gin, or any other strong liquors, to be sold in any part of the same or any other building or buildings aforesaid, then these presents shall thenceforth be null and void, and the land hereby granted shall revert to and be vested in us, our heirs and successors, as if these presents had not been made, anything herein contained to the contrary thereof in any wise notwithstanding.

The justices accepted this grant, and the sessions from time to time made rules and regulations for the sale of stalls in the market house, and for the sale of meat and provisions in the town.

The Act 6 Vict. c. 17 authorized the justices in sessions to make regulations for the sale of meat in Fredericton, except meats brought in and immediately sold by persons from the country, and to make regulations for the care and management of the market house, and to enforce such rules and regulations by fines and penalties. This Act was continued till the 1st April, 1855, by the 10 Vict. c. 9.

By the Act incorporating Fredericton (11 Vict. c. 61) the administration of the fiscal, prudential, and municipal affairs, and the government of the city, was vested in the mayor and councillors, when elected; and the 37th section gave them power to make bye-laws for various purposes, *inter alia*,—"To regulate and manage the market or markets, and to establish and regulate market days and fairs; to regulate the place and manner of selling butcher's meat, hay, straw, etc.; to restrain and regulate the purchase and manner of selling of all vegetables, fruit, country produce, poultry, and all other articles or things or animals exposed for sale, or marketed in the open air."

By sect. 40, all power and authority granted to the justices of the peace for the county of York to make bye-laws, rules or regulations upon any subject or for any purpose whatever within the city, were declared to be vested exclusively in the City Council.

This Act of incorporation was repealed by 14 Vict. c. 15, which was repealed by the Act 22 Vict. c. 8, the Act now in force, so far as it affects the present question, by which the whole legislative power and government of the city was vested exclusively in the City Council; and the 54th section enacts that the City Council shall have the sole power and authority to make bye-laws for various specified purposes,—*inter alia*, "To establish and regulate markets and fairs, and to grant licenses to butchers; to regulate the manner of selling, weighing and

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1881. measuring meat, fish, poultry, vegetables, fruit, grain, hay, straw, and
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 v. thereof."
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Before the Act 22 Vict. c. 8 was passed, and while the 14 Vict. c. 15 was in force, an Act (20 Vict. c. 17) was passed, which declared in sect. 1 that the lower flat of the building erected for a county court house and market house, or such part thereof as should be used for a market, should thereafter be and be deemed, a free market, and no toll, rate, or import, for any meat, fowls, fish, vegetables, fruit, hay, straw, grain, or other country produce of any kind therein sold or exhibited, or left for sale, should be at any time thereafter charged or levied; and (by sect. 2) that the County Council of the county of York and the City Council of Fredericton should make such rules and regulations for the government of the said market as they might deem advisable. These two sections were repealed by 23 Vict. c. 55. The 3rd section of 20 Vict. c. 17 still remains in force, by which it is declared that the piece of land described in the grant to the justices of York hereinbefore mentioned, "shall forever hereafter be under the sole control of the County Council of the county of York and their successors, and shall be used as a public landing, street and square for the said court and market house, and for no other purpose whatever."

At various times between the years 1855 and 1869, inclusive, the City Council exercised control over this market by appointing a market clerk, and disposing of the fees and tolls received thereat.

In May, 1879, the City Council passed a bye-law to consolidate and amend the several laws relating to the public markets in Fredericton, by which it was declared that Phoenix square, and no other place, should be the public market of the city; and that certain parts of the cellar of the new city hall, on the square, should be set apart for the purpose of a country market, and that no person should expose certain articles (including butter) for sale at any place except in the public market, under a certain penalty.

In July, 1879, the Municipality of the county passed a resolution declaring the lower flat of the county court house in Queen's Ward to be a free market, and the conviction in question is the result of this conflict of authority.

In the argument before me the following questions were raised:

First, Whether the grant from the Crown to the justices of the peace established a market.

Second, If it did whether the City Council or the Municipality of York has the control of it.

Third, Whether it is a free market, or whether the City Council can impose tolls on the sale of articles there.

Fourth, Whether the City Council has the right to close the market.

As to the first point it is very clear that the Crown did establish a market in the year 1815, at the place where the county court house now stands, which market was to continue for a term of twenty-one years; and, I think, when the Crown, in 1817, made the grant of the land to the justices, reciting the license to Taylor and the establish-

ment of a public market there, and declaring that the lower flat of the building then upon the land, or any other building which might be erected in its place, should be held by the justices in trust as a public market place for ever, the clear intention was, that what had been already established for a term of twenty-one years should continue to be a public market forever. I fail to see the distinction between the grant for a public market and a grant for a public market place, as was urged on the argument. What is a market place, but a place where goods are brought for sale? It would be rather unreasonable to hold, where a grant was made to a person for a "market place," that he had no right to hold a market there.

A grant of a piece of land for a "market place" is therefore, in my opinion, quite sufficient to authorize the grantee to establish a market there. If there could be any doubt about this, the subsequent words of the grant prohibiting the sale of spirituous liquors there clearly shows the intention of the Crown that the grantee should have authority to sell any other description of goods.

Then, assuming that a market was established by the grant to the justices, the next question is, who has the control of it? That the title to the land on which the market house stands is in the Municipality of York cannot be disputed. But the title may be in the Municipality, and the right to regulate the market in the City Council. *Ex parte Mowry*.¹

Before the incorporation of Fredericton, the justices in session had power to make regulations for the management of the market house; but by the 40th section of the Act of incorporation (11 Vict. c. 61) all the power and authority which the justices of the peace had to make regulations upon any subject within the city was vested exclusively in the City Council; consequently, after that Act passed, the justices ceased to have any power to make regulations respecting the market. That Act, however, was repealed by 14 Vict. c. 15, which contains no clause similar to the 40th section of 11 Vict. c. 61, but it does contain words which, I think are equivalent, and are sufficient, to exclude the Municipality of the county (who stand in the place of the justices of the peace) from making any regulation for the management of the market. The words I refer to are those of the 4th section, which vests "*the whole legislative power and government of the city*" in the City Council, "*and in no other power or authority whatsoever.*" Similar words are used in the 4th section of the Act 22 Vict. c. 8, which now regulates the power of the City Council; and the 54th section of which re-affirms that the City Council shall have "*the sole power and authority*" to make bye-laws for various purposes within the city—one of which purposes was the regulation of markets, and another the regulation of the manner of selling and weighing meat, fish, poultry, etc. These powers do not differ materially from those given to the justices by the Act 6 Vict. c. 17. I have no doubt therefore, that the powers given to the City Council to make bye-laws respecting the markets by the 54th section apply as well to the market house in Queen's ward, as to the market house at Phoenix square,

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¹ 18 Allen 276.

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and that the Municipal Council has no power to make any market regulations to be enforced in the city, though they have the title to and control of the land and the county building thereon for the purposes declared in the grant. I think it was the clear intention of the Legislature that there should be only one governing body in the city—the City Council—and that the laws regulating the markets, and the sale of meats, etc., in them, should not be vested in two bodies, whose regulations might conflict.

The third question is, whether the City Council has a right to impose tolls on the sale of articles in this market. It was argued that the right to impose tolls was incident to the right to establish a market. I admit that the Crown, in granting a right to establish a market, may also grant a right to demand tolls; but that right must be given in express terms.

In Chitty's Prerog. Crown 194, it is said, "But toll is not incident of common right to a fair or market; therefore, if the King do not expressly authorize the grantee to take it, he cannot legally do so, though the grant contain the words 'with all its appurtenances'; and in such case the market or fair is free." See also Com. Dig. "Market," (F) *Heddy v. Wheelhouse*.¹

Whether the City Council has a right, under the charter, to impose toll on the sale of articles exposed for sale in a market *established* by them, does not arise here, because the market in question was not established by the City Council under the authority given by the charter, but by grant from the Crown long before the incorporation of the city, and that grant gives no authority to take toll. By the grant it became a free market; and the City Council, without express authority to do so, which I am unable to discover, has no right to impose a burthen on persons resorting to that market for the sale of their goods.

The 59th section of the Act 22 Vict. c. 8, has been referred to as authorizing the imposition of a toll on the sale of articles brought to market. It is not very clear to me what that part of that section means, but at all events, I think it does not apply to such a case as this. The words of that section are as follows: "The City Council may direct the assessing, levying, collecting and applying such moneys as may be required for the execution of the powers vested in the City Council in such manner as may be provided by any bye-law of the city, either by imposing tolls and rates to be paid in respect of any public works, or of other thing within the city, or by means of any rate or assessment to be assessed and levied on real or personal property, or both, within the city," etc.

I think it is not unimportant, in the consideration of this question, that no express authority is given to impose tolls by those portions of the 54th section which relate to the markets and the sale of meat, etc., whereas the 9th paragraph of the section, which relates to the management of the wharves, expressly authorizes the Council to impose a toll for vessels using the wharves, and for goods placed thereon. *Expressio unius est exclusio alterius*. It is a well settled principle of

¹Co. Ed. 559-561.

law that no tax can be imposed without express authority and a plain declaration of the intention of the Legislature to impose it. See *Stockton Railway Co. v. Barrett*,¹ *Caswell v. Cook*,² *Mayor of Londonderry v. McIlminky*.³ Even if there is authority to impose a toll on the sale of meat, etc., in a market established by the city, I certainly think there is none in respect to a free market established by grant from the Crown. I am unable to give to the Act 23 Vict. c. 55, the effect which was contended for. The 20 Vict. c. 17, sect. 1, had declared that the lower flat of the county court house should thereafter be deemed a free market, and that no toll should be charged for any meat, etc., sold or exposed for sale there; and the 2d section directed that the County Council and the City Council should make rules and regulations for the government of the said market.

The City Council took exception to this Act, and in June, 1857, a committee was appointed to prepare a petition to the Legislature against it. In February, 1858, another committee was appointed by the City Council to confer with the County Council on the subject of markets, and for the purpose of obtaining a repeal of this 2d section of the last mentioned Act. Nothing appears to have been done by the Legislature till 1860, when the Act 23 Vict. c. 55, was passed, repealing the 1st and 2d sections of 20 Vict. c. 17.

When an Act is repealed, it must be considered (except as to transactions done under it) as if it had never existed. I cannot therefore agree that the effect of the repealing Act is a legislative declaration that the market in question should *not* be a free market.

The remaining question is whether the City Council had the right to pass the bye-law, which in effect closed the Queen's Ward market. I think they had not. The charter gives them power to establish and regulate markets, but it gives them no authority to close up a market previously granted by the Crown, and, without express authority, they cannot interfere with the Crown grant.

The case of *The University v. McClusky*⁴ is quite applicable on this point. It would require a very clear expression of intention in the charter to take away the rights of the grantees, or their successors, under the Crown grant; and I think there is an entire absence of any such intention. On the contrary, the 3rd section of 20 Vict. c. 17, shows that the Legislature intended the market should continue.

The evidence in this case shows that the sale of the butter, for which the defendant was fined, took place in this public market; and as, in my opinion, the City Council had no authority to pass a bye-law prohibiting the sale of articles in that market, the conviction must be set aside.

If the City Council desire to bring the question before the Supreme Court, I will not set aside the conviction, but reserve the case for argument before the Court.

October 15, 1881. *Rainsford* moved to set aside the conviction. Unquestionably this was a free market, and the

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¹11 C. & F. 307.
²11 Q. B.; N. S. 637.

³9 Irish R., C. L. 61
⁴6 Allen 133.

1881. question is, whether the Legislature has given the City of
 EDWARDS Fredericton a right to impose tolls on the sale of articles in it?
 v. I contend that they have not. That could only be done by
 BURGONYE. express words. *Jamieson v. City of Fredericton*; ¹ *University of New Brunswick v. McClusky*.²

C. W. Beckwith, contra. The city was satisfied with the judgment of the Chief Justice, as the case was presented to him, but 30 Vict. c. 37, s. 3, was not cited on the argument before him. By that Act the City Council are authorized generally to impose tolls and rates, and to sell or otherwise dispose of tolls arising from markets. I claim that this Act carries the matter further than the other Acts and authorizes the City Council to impose the tolls. *Rex v. Rose*.³

Rainsford, in reply.

WELDON, J. I think the opinion of the Chief Justice was correct; and I do not think the Act of 1866 alters the case.

WETMORE, J. I agree with the judgment of the Chief Justice; and I do not think that section 3 of 30 Vic. c. 37, carries the matter any further. I think the defendant should have costs.

DUFF, J. I agree with the judgment of Chief Justice; and I think that the law is not altered by sect. 3 of the Act of 1866.

PALMER, J. As far as I have had an opportunity of considering the judgment of the Chief Justice, I agree with him; but I do not wish it to be understood that it is my view of the matter. I would require time to consider it, if necessary; but as I understand the contention of the city, they are satisfied with the judgment of the Chief Justice, as the matter was presented to him. In my opinion the Act 30 Vic. c. 37 does not carry the matter any further. It does not authorize the City Council to impose tolls, where before it had no power to do so.

KING, J. It is not necessary to decide whether the judgment of the Chief Justice is correct or not. If the law is not changed by section 3 of the Act of 1866, an Act which was not referred to when the case was before the Chief Justice, on the occasion on which this judgment was delivered, the conviction must be set aside. I think that section 3 of that Act does not affect

¹ 2 Allen 128.

² 6 Allen 126.

³ 6 Ad. & El. 152.

the case. I may add that from the consideration that I have been able to give the matter, I agree with the Chief Justice.

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ALLEN, C. J. In my opinion 30 Vic. c. 37, s. 3 does not affect this question, or carry the matter any further.

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Referred back to the Chief Justice, to make the order quashing the conviction.

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Slander—Pleadings—Evidence—Setting out all the material words constituting the slander—Variance.

October.

In the first count of the declaration it was alleged that the defendant spoke the following words about the plaintiff: "Go and get a search warrant and you will get your pork there," meaning thereby that the plaintiff had feloniously stolen pork. The words proved were "Go and get your warrant and you will get your pork." These words were spoken by the defendant in the course of a conversation with one B., who stated that his pork had been stolen, and that he thought of taking out a search warrant to search the plaintiff's place. The judge directed the jury that the words as laid were not proved and withdrew that count from their consideration.

Held, (by ALLEN, C. J., and DUFF and KING, JJ., WELDON and WETMORE, JJ., dissenting), that the words as laid were capable of the defamatory meaning attributed to them when read in connection with the facts in evidence, and that the words were sufficiently proved, and the count should have been left to the jury.

By the fifth count of the declaration the plaintiff alleged that the defendant falsely spoke and published of him the words following "Judson Harris in there," meaning thereby that the plaintiff had feloniously stolen pork. Some pork had been stolen from B. According to the evidence of one of the plaintiff's witnesses the defendant during the forenoon of the day on which it was said these words had been used, said he knew where the pork was, stating where, and intimating that he knew who stole it. Being asked, by the witness during the afternoon, whom he meant, he said "Judson Harris in there."

Held, That the count was bad in not setting out all the material words constituting the slander.

This was an action of slander tried before Mr. Justice Wetmore at the York sittings. The judge withdrew the first count of the declaration from the consideration of the jury, but directed them on the seventh count to find for the plaintiff if they believed his witnesses. The jury found for the defendant. The facts and pleadings are fully stated in the argument and in the opinions of Mr. Justice Wetmore and the Chief Justice.

June 20, 1881. *E. L. Wetmore* moved for a new trial.

This was an action for slander tried before Mr. Justice Wetmore at the York sittings. The Court are to say whether the words used are capable of bearing the meaning attributed to them, and then it is for a jury to find whether they were used

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in that sense. There was evidence to go to the jury on the first count. The words were used in the course of a conversation relating to the pork, and getting out a search warrant. There was evidence of a stealing and it was a question for the jury whether the words used had reference to a charge of stealing. The words were,

I told "Clayton I had a notion of getting out a warrant to search plaintiff's place; Clayton told me: 'Go and get the warrant, and you'll get your pork.'"

This is in the evidence of Israel Burt. There was no objection taken by the defendant's counsel to the evidence as being a variance. [WETMORE, J. Should you not have amended the declaration in accordance with the words proved?] Not at all —no objection being taken by the counsel. Besides, the words were substantially proved, and that was enough. The learned Judge thought otherwise because the word "there" was not proved. That, however, does not amount to a variance. *Stace v. Griffith*; ¹ *Vye v. Newman*.² Whether the words omitted qualify those which are alleged, must depend on the surrounding circumstances. Burt was speaking of stealing from Harris's house.

In the fourth count the words alleged were "Judson Harris in there," the words proved were "Judson C. Harris in there." The slander was not committed in the morning, but in the afternoon, when Clayton said, "Judson C. Harris in there." It is not now necessary to set forth in the declaration prefatory matter. Consol. Stat., c. 37, sec. 55; Bul. & Leake, 305. [ALLEN, C. J. Neither the words used in the morning nor those used in the afternoon are in themselves actionable. The whole taken together makes the slander.] It is not necessary to insert in the declaration the words used in the morning. [KING, J. Suppose Burt, in the afternoon, had asked Clayton, "Did you mean this morning that Judson C. Harris stole the pork?" and Clayton had simply replied, "yes," would it be enough simply to set out that one word?] I submit it would under the Statute and the authorities. The declaration sets out the defamatory sense with which the words were used.

[ALLEN, C. J. I do not think the Legislature ever intended to reduce the matter to that.]

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McManus, contra. The whole conversation—that is, whatever is material, must be set out. Add. on Torts (ed. 1876) 376. note; Flood on Libel and Slander, 353. Assuming a misdirection, it must be on a material point, and there must be a miscarriage of justice. *Anthony v. Halstead*.¹

From the declaration and pleadings, and evidence, the whole case was fairly left to the jury. The plea of "not guilty" puts in issue the defamatory sense. The verdict should not be disturbed.

Wetmore, in reply.

Cur. adv. vult.

The following opinions were now delivered:—

ALLEN, C. J. The first count of the declaration states that the defendant spoke the following words about the plaintiff, "Go and get a search warrant, and you will get the pork there," meaning thereby that the plaintiff had feloniously stolen the pork.

It appeared that Israel Burt had lost some pork, which was taken out of his shed during the night, and having suspicion that the plaintiff had taken it, he asked the defendant a few days afterwards if he knew of any person being about his place in the night; to which the defendant apparently made no answer. Burt then told the defendant that he saw a ladder at the plaintiff's window the day before; that he had watched all day, and saw the plaintiff go up to his chamber on that ladder; and as he went up he shut a little door; and that he (Burt) had a notion of taking out a warrant to search the plaintiff's place: whereupon the defendant said, "Go and get the warrant and you will get your pork."

Under the old practice, the declaration in such a case as this, would have contained a special inducement to explain the slander, stating that before speaking the words, a quantity of pork had been taken from Burt's premises, and that in a discourse which the defendant had with Burt concerning the taking of the pork, and concerning the plaintiff, the defendant falsely and maliciously spoke and published the words in question, of and

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 HARRIS that the defendant thereby meant that the plaintiff had stolen
 v. the pork. As the words charged are not by themselves intelli-
 CLAYTON. gible, I think what Burt said to the defendant about the ladder
 and about searching the plaintiff's house should have been
 stated in the prefatory inducement or colloquium. In 1 Chit.
 Pl. 400, referring to *Hawkes v. Hawkey*,¹ it is said—

“If the words do not naturally and *per se* convey the meaning the plaintiff would wish to assign to them, or are ambiguous or equivocal and require explanation by reference to some extrinsic matter to shew that they are actionable, it must be expressly shewn that such matter existed, and that the slander had relation thereto.”

It was contended by the plaintiff's counsel that the necessity for such prefatory averments is rendered unnecessary by the 55th section of the Com. L. Proc. Act, (Consol. Stat. p. 235) which enacts as follows:—

“In actions of libel and slander, the plaintiff shall be at liberty to aver that the words or matter complained of were used in a defamatory sense, specifying such defamatory sense, without any prefatory averment to shew how such words or matter were used in that sense, and such averment shall be put in issue by the denial of the alleged slander or libel and where the words or matter set forth with or without the alleged meaning, show a cause of action, the declaration shall be sufficient.”

It was also said that the plaintiff may now set out the words complained of, without any colloquium or prefatory statement, and put any construction upon them he pleases; for which *Hemmings v. Gasson*² was cited.

But the doubt in my mind is, whether the plaintiff has set out all the material words here. What the defendant said was in answer to Burt's statement of his having seen the plaintiff on the ladder, and his (Burt's) intention to get a search warrant. The slander is to be collected from the words of Burt, and the defendant together, and not from those of the defendant alone. In 1 Chit. Pl. 405, it is said that if the slander is to be collected from a question and answer, and not from the latter only, there must be an express averment accordingly. And see *Bromage v. Prosser*;³ *Galloway v. Marshall*.⁴

I cannot understand what was intended by the concluding words of the 55th section,—

“And where the words or matter set forth, with or without the

¹ 8 East. 427.

² E. R. & E. 346.

³ 4 B. & C. 247.

⁴ 9 Exch. 284.

alleged meaning, shew a cause of action, the declaration shall be sufficient.

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If by the words "shew a cause of action is meant," a cause of action apparent on the face of the declaration, then certainly there is none such in the first count of this declaration, nor indeed in any of the counts, except, possibly the second. I cannot think that the Statute intended to allow such a mode of declaring as has been adopted here; that a plaintiff may set out a portion of a conversation, which is quite unintelligible *per se*, averring that those words were used in a defamatory sense, and supply the remainder of the conversation, which is necessary to make out the slander, by evidence on the trial.

The learned Judge was of opinion that the words stated in the first count were not proved,—that the omission of the word "there" was a material variance. I do not so consider it. It is unnecessary to prove all the words laid in the declaration, if the omission of those not proved does not alter the sense or meaning. The word "there" would imply that Burt would find his pork in a particular place designated by the defendant; and if the words proved are read in connection with what Burt said to the defendant, and which produced his remark, viz: that he (Burt) had a notion to take out a warrant to search the plaintiff's place—it is very evident that the defendant's words meant Burt would find his pork at the plaintiff's house. Viewing it in that way, I think the omission to prove the word "there" was not material, as it did not alter the sense. The word only expressed what was clearly implied without it. Had the declaration set out the *colloquium* between the defendant and Burt about the loss of the pork, and the intention of Burt to issue a search warrant, the words proved to have been spoken by the defendant would have referred clearly enough to the place he said the pork would be found, and this question would scarcely have arisen.

The plaintiff's counsel relied particularly on the fifth count, the words in which, he contended were proved, and shewed a cause of action. That count was as follows:—"For that the defendant falsely, etc., spoke and published of the plaintiff, the words following, '*Judson Harris, in there,*' meaning thereby that the plaintiff had feloniously stolen pork." If this is a good

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count under the Com. Law Proc. Act, it has revolutionized the principles of pleading in actions of slander.

The words were sworn to have been spoken by the defendant under the following circumstances:—In October, 1879, Benj. Burt, a brother of Israel Burt, who had lost the pork, met the defendant near a saw mill. The defendant asked Burt if his brother had found his pork yet, to which Burt answered that he had not; the defendant then said he knew where it was, and on Burt asking him "where," he said, "In the saw-dust" (pointing to a heap of saw-dust), and added, that he knew it was there; that he saw a person very uneasy, walking about on the saw-dust; and he told Burt to tell his brother to watch for the pork that night as it had to be taken in, or it would spoil. In the afternoon of the same day Benj. Burt met the defendant again in the highway near the plaintiff's house, and, referring to their conversation in the morning at the mill, said to him—"Who did you mean? you did not name any one." To which the defendant, pointing to the plaintiff's house, answered "Judson Harris, in there."

What the defendant said to Burt on this occasion was virtually a mere continuation of their conversation in the forenoon, and both conversations together constitute the slander, and should have been set out in the declaration to make it intelligible. Neither the words spoken by the defendant in the morning, nor those in the afternoon are slanderous, taken separately; but taken together, they clearly are so; and if the declaration in slander is of any importance, it surely must be necessary to set out all the material words spoken in reference to the matter on any one occasion, in order that the jury may determine whether they are capable of bearing the interpretation put upon them in the declaration.

The insufficiency of this count was well illustrated during the argument, by the plaintiff's counsel being asked whether, if Burt, instead of asking the defendant whom he meant by his remarks in the morning, had asked him if he meant the plaintiff and the defendant had simply answered, 'Yes,' it would be sufficient merely to set out that monosyllable in the declaration, with an *innuendo* that the defendant thereby meant that the plaintiff had stolen pork? This is a *reductio ad absurdum*,

but it seems to me to shew conclusively the utter defectiveness of the fifth count.

No objection, however, was taken at the trial to this novel mode of declaring; and the words set out in several of the counts were sworn to have been used by the defendant.

The seventh count alleges that the defendant spoke the following words:—"Take it out, you'll get your pork:" meaning thereby, etc. The learned Judge directed the jury that if they believed the evidence on the part of the plaintiff, to find a verdict for him on this count—otherwise to find for the defendant, and the jury found for the defendant.

Now, I think the evidence much more nearly supports the words as laid in the first count, than it does those in the seventh; and the jury having been told that the first count was not proved, and their consideration of the case having been thus confined to the seventh count, they may very well have come to the conclusion that the words in that count were not proved, and so given their verdict for the defendant; whereas, if they had been instructed that the words of the first count were substantially proved, if they believed the plaintiff's witnesses, their verdict might have been different. I cannot agree with the learned Judge that the words of the first count were substantially left to the jury in the direction on the seventh, when the first count was withdrawn from the jury. I therefore think there should be a new trial.

WETMORE, J. The several counts of the declaration are extremely short, having been framed under section 50 of chapter 37, Consol. Stat. There is no inducement, statement of introductory matter or colloquium. The first count is as follows:

"Judson C. Harris, etc., sues James S. Clayton, for that the defendant falsely and maliciously spoke and published of the plaintiff the words following namely:—'*Go and get a search warrant and you will get the pork there.*' The defendant meaning thereby that the plaintiff had stolen pork."

The second count alleges these words:—

"*Go and get a search warrant, and you will get the pork there with Jud. Harris (meaning the plaintiff), in his chamber, and where you will find everything that has been stolen; if you knew him as well as I know him, you would know it was there.*" meaning thereby the plaintiff had been guilty of larceny.

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The words alleged in the third count are:—

“‘*I know it is there,*’ meaning that plaintiff had feloniously stolen pork.”

In the fourth count:—

“‘*I am sure it is there,*’ meaning that plaintiff had feloniously stolen pork.”

In the fifth count:—

“‘*Judson Harris in there,*’ meaning that plaintiff had feloniously stolen pork.”

In the sixth count:—

“‘*I do, I know he has got it,*’ meaning that plaintiff had feloniously stolen pork.

In seventh count:—

“‘*Take it out, and you’ll get your pork,*’ meaning that plaintiff had feloniously stolen pork.”

The plea defends the wrong and injury when, etc., and says that the defendant is not guilty of the supposed grievances laid to his charge, or any or either of them or any part thereof, in manner and form as, etc.

The verdict being for the defendant, on motion for a new trial the plaintiff complained of misdirection of the learned Judge, in directing the jury that there was no evidence to support the first, second, fourth, and fifth counts. The evidence necessary to be referred to was substantially as follows:—One Israel Burt, plaintiff’s witness, said he had lost some pork which was taken away in the night. In conversation with defendant, he asked defendant if he ever knew of any person to be around his place in the night, and told defendant he saw a ladder to plaintiff’s window the day before (this would be the day before the conversation), that he had watched all day and saw Harris (this would be plaintiff) go up to his chamber on that ladder. As he went up he shut to a little door. He, the witness, told defendant he had a notion of taking out a warrant to search plaintiff’s place, and defendant said to the witness “*to go get the warrant, and you will get your pork.*” The witness said, he supposed the defendant thought it was there. This is the evidence respecting the first count.

Another of the plaintiff’s witnesses, Benjamin R. Burt, upon whose testimony it was sought to maintain the third, fourth, fifth, and sixth counts, detailing an alleged conversation with

defendant, gave the following evidence. I give his evidence from my minutes :—

"Defendant said, 'has Israel Burt found his pork yet?' I said, 'no, nor never will.' He said he knew where it was. I said, 'where?' He, turning round, pointing to the saw-dust said, 'in the saw-dust.' I said, 'oh, nonsense, you don't think so?' He said, 'I do. *I know it is there. I am sure it is there. I'll bet you a five dollar bill it is there.*' He said he saw a person very uneasy walking about in the saw dust. He said, 'will you see your brother to-night?—tell him to watch to-night for the pork, it has to be taken in to-night or it will spoil.'"

They parted, and some time afterwards, the same day, on the witness's return from some place he had been to, he again met the defendant and, referring to the previous conversation, remarked to him, "Mr. Clayton, who did you mean, you did not name any one." He spoke very low, and said, "*Judson C. Harris, in there,*" pointing to Harris's. This is all the evidence material to the slanderous words alleged.

The 53rd section of cap. 37, under which the declaration was framed, is as follows :—

"In actions of libel and slander the plaintiff shall be at liberty to aver that the words or matter complained of were used in a defamatory sense, specifying such defamatory sense, without any prefatory averment to shew how such words or matter were used in that sense, and such averment shall be put in issue by the denial of the alleged slander or libel, and where the words or matter set forth, with or without the alleged meaning, shew a cause of action, the declaration shall be sufficient."

There is no pretence of there being evidence to support the second count. No question was raised as to the sufficiency of the declaration, and the words proved on behalf of the plaintiff were entirely disproved by the defendant. Without the alleged meaning the words used do not shew a cause of action. To entitle the plaintiff to recover he must set forth the words alleged to convey the slander, and he has to allege the slanderous meaning; and if these words, with the alleged meaning, shew a cause of action, the declaration be sufficient. This is a statutory right, and I apprehend the statutory requirements must be complied with before the plaintiff can avail himself of the benefit of the Statute. The plaintiff can aver the words used and that they were used in a defamatory sense, stating the defamatory sense. The denial of the slander puts in issue such averment. The plaintiff is not required by any prefatory

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avermment to shew how such words or matter were used in the defamatory sense. Still, I apprehend, he must set forth the words, and also the defamatory sense. It appears to me all the words must set forth, and exactly set forth to entitle the plaintiff to recover, where they are not actionable in themselves. The latter part of the section is:—

“And where the words or matter set forth, with or without the alleged meaning, shew a cause of action, the declaration shall be sufficient.”

In the present case none of the words shew a cause of action without the alleged meaning. Must not the plaintiff name his words, upon which his defamatory sense is based, and all the words? The sections speaks of such words. Is not the defamatory sense based upon the words set out in the declaration and must they not be proved verbatim as laid? The defendant has denied the words as well as the defamatory sense. The section goes to an almost startling extent, and I think it would not be well to extend the extravagance of the enactment beyond its positive provisions. Any variance in proof of the words used from those set forth in the declaration, and upon which he has put his defamatory sense I think is fatal. The Statute allows the plaintiff to put his words forward, and to put his defamatory sense upon the words so put forward, and that is all it allows. Failing to prove the words stated in the declaration, his defamatory sense must go with it. In case of variance no great inconvenience would arise, application could be made to amend, and the Judge would allow it upon reasonable terms. As to the first count, the words in the declaration are, “*go and get a search warrant, and you will get the pork there*” The words proved are—“*to go and get the warrant, and you will get your pork.*” I think there is sufficient difference between the declaration and words proved, to prove fatal. He has not proved the words that he has founded the defamatory sense upon.

But apart from this view, I refer to the seventh count where the words are, “*take it out, and you'll get your pork.*” The words proved as applicable to the first count were left to the jury under the seventh count, to which latter count the Judge thought them applicable. In so leaving them I think I went

much further than I should have done. Still the plaintiff cannot complain of that. It will be recollected the statement of the words throughout, as put forward by the plaintiff was entirely contradicted by the defendant. I left the seventh count to the jury, if they believed the plaintiff's account of the words, he was entitled to recover on the seventh count; if they believed the defendant's account, he was not entitled to recover, and the jury believed the defendant's account. There was no evidence to support the second count. The words in the third count, "I know it is there," were left to the jury, and found against the plaintiff, under the contradictory evidence. On reflection I think these words should not have been left to the jury. In the fourth count the words are, "I am sure it is there." And in the fifth count, "Judson Harris in there." The words proved are "Judson C. Harris in there." I cannot see what there was to justify or warrant the alleged defamatory sense the plaintiff has thought proper to give to these isolated words. They do not and cannot mean what they are alleged to mean, and there was nothing to justify such alleged meaning being given to the words set forth, and nothing to justify my leaving such alleged meaning to the jury. The whole of the words, I think, must be stated; certainly such of them as will warrant the alleged defamatory sense. I do not think it is competent for the plaintiff to pick out two or three of the words and put his defamatory sense upon them,—if he can do so, why not take one word? The words "Judson Harris in there," are not slanderous words: they were merely used to indicate the person to whom previous words, whether slanderous or not, were intended to apply. The previous words must constitute the slander, and not the saying to whom it was intended to apply them. The first count, the best of the lot, has substantially been left to the jury by the leaving of the seventh count to them.

Under my direction, if the jury believed the account given by plaintiff's witnesses, the plaintiff was entitled to recover on the seventh count. And if they had credited the evidence, most unquestionably they must have found for the plaintiff, and my opinion, whether right or wrong, as to the plaintiff's right to recover on the first count, by no possibility, could have affected the finding of the jury in the slightest degree.

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The ruling as to the plaintiff not being entitled to recover on the first count, if erroneous and prejudicial to the plaintiff, unless corrected in some way, would be ground for a new trial. But if wrong, was it not corrected? How was the ruling to affect the verdict, so far as the finding of the jury was concerned? This must be determined upon what was left to the jury. What matters it whether the Judge said the plaintiff could recover on any one count or not—the first or the seventh? The ruling as to the plaintiff's right to recover upon any particular count must be a matter of perfect indifference, if the plaintiff's case was clearly left to the jury. If the evidence was left to the jury, and that with direction that the plaintiff was entitled to recover, if the jury believed it, what possible difference could the naming of a particular count, and that even in a wrong way, make? On entering the verdict, it might make such a difference as would necessitate application to the Court to correct the entry by applying it to the proper count. No difficulty of that kind has arisen. The plaintiff's evidence was given. The Judge thought the first count could not be sustained under the evidence—but was of opinion, the evidence would sustain the seventh count, and told the jury so, and that if they believed the evidence for plaintiff, to find for him for such damages as they thought proper under the circumstances; and the jury did not believe the evidence, and found for the defendant. What would the jury know about the recovery upon one count or another? All that was required was, that the evidence should be submitted to the jury with a proper direction. The direction was that the plaintiff was entitled to recover, if the jury believed the evidence adduced in his behalf. The plaintiff could not have asked more. The evidence undoubtedly was most contradictory. The effect of the direction was only in respect to which count the plaintiff should have his verdict entered, if the jury thought he was entitled to a verdict. The jury were told if they believed the evidence on the plaintiff's behalf he was entitled to a verdict; and by the finding they evidently did not believe it. Suppose the first count had not been mentioned—what possible difference could it have made in the verdict? Must not the matter have still depended upon whether or not the jury believed the evidence for the plaintiff,

which was so completely contradicted by that for the defence? Was the direction other than,—if the jury believed the plaintiff's evidence he was entitled to recover, but that his verdict must be entered upon a particular count? How could the reference to the first count affect the finding when the whole matter depended upon the credit given to the testimony? It is very easy to say the jury may have been misled, but in order to justify the Court in granting a new trial, there should be some substantial reason to justify a conclusion that they were misled. At all events the Court must be in such a position as not to be able to say they were not misled. I have considered the matter most carefully, and fail to discover the slightest reason for sending this matter down, and putting the parties to the expense of another trial. The plaintiff's evidence has been fully submitted to a jury with direction if they believed it, to find for him; and they have disbelieved it in the face of the positive contradiction opposed to it, and there I think the matter should rest. The issue, in fact, has been disposed of: the jury have said by their verdict that they did not believe the evidence for the plaintiff. The fact of the Judge being under an erroneous impression, if he really was in error, as to the plaintiff's right to recover upon the first count, did not prejudice the plaintiff in the slightest, because the evidence was left to the jury with direction, if the jury believed it, to find for the plaintiff. The whole matter was one of credibility, and the jury disposed of it by not believing the evidence for the plaintiff. It is discretionary with the Court as to granting a new trial. I fail to see any reasonable ground for exercising it in the plaintiff's favor in the present case. I think the rule should be refused.

WELDON, J., concurred in the opinion of Mr. Justice Wetmore.

DUFF, J., agreed with the Chief Justice.

KING, J. This case raises questions of proof rather than of pleading, but a consideration of it as a matter of pleading may help in its decision. Formerly in an action for words, where the words were not actionable in themselves, but could be understood in an actionable sense only by reference to certain facts, such facts had to be distinctly stated in the declaration, and it had to be averred that it was in reference to these facts,

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as well as of and concerning the plaintiff that the words complained of were spoken. The words complained of were then set out and connected by proper innuendoes with the previously stated facts, and the declaration then proceeded by innuendo to attribute to the words as so spoken an actionable sense; and if the meaning so put upon the words by the innuendo was a meaning of which the words when read in the light of the prefatory matter were not capable, the declaration was held to disclose no cause of action.

But now the plaintiff may set out the words (alleging them to have been spoken of and concerning him) without any prefatory matter whatever, and may then proceed to ascribe to them any actionable sense he pleases, and may on the trial support his innuendo by proof of any facts that would, if set out under the former mode of pleading, have sufficed to support the innuendo, and it is for the Judge to determine upon the evidence adduced at the trial, whether the words are reasonably capable of the meaning ascribed to them; *Hunt v. Goodlake*.¹

While the Act thus dispenses with the prefatory matter and gives a new office to the innuendo, it does not touch the law as to the statement of the words complained of. These are to be laid and to be proved according to the rules that governed the allegation and proof of them before the Act. Now it was and is a variance if the words as alleged are materially qualified by evidence of words not contained in the declaration, even though the words as laid and the words as so qualified are alike slanderous, *Ruiny v. Bravo*; and where the meaning imputed by the innuendo cannot reasonably be collected from the words complained of, either as taken alone or in connection with the facts to which they relate, but requires for its support that other words spoken by defendant be also taken into account, then such other words when proved are not prefatory matter at all, but are a substantial part of the slander, and not being set out in the declaration as part of the words complained of, there is a variance (by the omission from the declaration of substantial words) between the words as laid and the words as proved. In such case the omitted words are not available, as

¹ 143 E. J. C. P. 54.² 12 R. 4; P. C. 267.

extrinsic facts would be, to give to the words as laid a defamatory meaning of which they are not otherwise capable, and the innuendo, which under the act is in issue, must be held to be not proven. Now here in the fifth count the words, "Judson Harris in there," although they might point to a prior slander, were not of themselves or as interpreted by the extrinsic facts in evidence, and apart from other words spoken by defendant, susceptible of the actionable sense attributed to them, and therefore the learned Judge rightly directed that the plaintiff was not entitled to succeed on this count.

As to the first count, I agree with the learned Chief Justice that the words as laid are capable of the defamatory meaning attributed to them, when read in connection with the facts in evidence, and that the words were sufficiently proved and that therefore this count should have been left to the jury. I hardly feel free to consider the effect of the direction given on the seventh count, at least without a fresh argument, as it is a matter that was not argued before us.

As some question arose upon the meaning of the last clause of section 55 of chapter 37 of the Consol. Stat., I would refer to *Watkin v. Hall*,¹ where similar words in the English C. L. P. Act were held to mean that in an action for words actionable in themselves, but to which a certain actionable sense is assigned by innuendo, the plaintiff is not concluded by such innuendo but may recover if the words are capable of any other actionable sense whatever.

Rule absolute for a new trial.

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Offer to suffer judgment by default—By one of several defendants—In an action of trespass—Effect of—Costs of making cause a remanet part of the general costs in the cause—Affidavit for taxation of witness fees—Sufficiency of—Cost of writing letters to each of several defendants—Whether taxable—Costs of discharging rule where point raised is new.

Where in an action of trespass one of several defendants offered, under Consol. Stat. c. 37, s. 127, to suffer judgment by default for \$50, and the plaintiff recovered against all the defendants for that sum (\$50), it was held that the plaintiff was entitled to costs against all the defendants.

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CHAPMAN. *Held*, that the plaintiff was entitled to the costs of making the cause a remanet as part of the general costs in the cause.

The affidavit of the attendance of witnesses stated that a paper annexed "was a statement of the number of the witnesses who attended for the plaintiff on the trial of the cause, the number of days each one attended, and the number of miles each travelled, and that the plaintiff believed they were material and necessary witnesses."

Held, sufficient, (ALLEN, C. J., doubting).

Semble. That the plaintiff is entitled to the costs of sending a letter to each of several defendants.

The point raised being new, the rule was discharged without costs, (WETMORE and PALMER, JJ., dissenting).

This was an action of trespass to land, to which all the defendants appeared and pleaded.

The cause was entered for trial at the Westmorland Circuit in July, 1877, but was not tried, and stood as a *remanet*. It was tried at the next Circuit in January, 1878, when the plaintiff obtained a verdict. On application of the defendants, a new trial was granted on payment of costs. (See 2 P. & B. 440.) The costs were taxed and paid, immediately after which the defendant, Chapman, made an offer under the Consol. Stat. c. 37, s. 127, to suffer judgment by default, and that judgment might be signed against him in the suit for \$50 damages. The plaintiff did not accept the offer, but gave notice of trial again, and the cause was tried in January last—the plaintiff obtaining a verdict against all the defendants for \$50 damages. On the taxation of the costs, the defendant, Chapman, contended that he was only liable for costs up to the time of giving notice of his offer to suffer judgment, and was entitled to recover the subsequent costs against the plaintiff; the clerk, however, taxed the full costs to the plaintiff. Objection was also taken to other items in the bill of costs, and to the affidavit of the attendance of the witnesses, which stated that a paper annexed—

"Was a statement of the number of witnesses who attended for the plaintiff on the trial of the cause; the number of days each one attended, and the number of miles each travelled," and that the plaintiff believed they were material and necessary witnesses.

A paper containing the names of the several witnesses, the number of miles each one travelled, and the number of days each attended, was annexed to the affidavit. The clerk allowed

the charge for the witnesses, and the other items objected to, as stated below.

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In Easter Term last, a rule *nisi* was granted for a review of the taxation, on the following grounds:—

1. That the defendant, Chapman, was entitled to the costs incurred subsequent to his offer to confess judgment:

2. That the costs of entry, etc., at the circuit, when the cause was made a remanet, were not taxable in the general costs:

3. That the affidavit of the witnesses' attendance was insufficient:

4. That the plaintiff was only entitled to recover for writing one letter before action, under the table of fees.

April 25th. *P. A. Landry*, shewed cause. The affidavit on which the rule was granted is insufficient, because it does not state specifically the items objected to, and allowed by the clerk on taxation. As to the insufficiency of affidavit for witness fees, etc., see *Murray v. Williston*.¹ As to the objection that there was no proof before the clerk of service of subpoenas, I say that the clerk was properly guided by the affidavit of witness fees. The clerk's charge of one dollar for entering cause after it had been made a remanet is proper. Plaintiff is entitled to be allowed fees for a letter to each defendant: Consol. Stat. p. 955.

D. L. Hanington, on the same side. The words "any defendant," in sect. 127, chap. 37 of the Consol. Statutes, mean all the defendants. The plaintiff cannot sign his judgment against one defendant of many on an offer to suffer judgment by that one, because the Court has decided that there can be only one judgment in a case and one taxation of costs: *Jones v. Bijou*.² The Court stopped Hanington and called upon

G. F. Gregory, in support of the rule. There is a distinction between cases of contract and of tort. The plaintiff can recover against any one of many wrong-doers. Arch. P. (12th ed.) 498. [PALMER, J. Suppose one defendant suffered judgment for fifty dollars, another for sixty, and another for seventy, and a verdict was obtained for ten dollars, how are you going to sign judgment?] The plaintiff could elect, and enter a *nolle prosequi* against the other defendants. The plaintiff elects to join a

1881. number of defendants: he might only have sued one. [ALLEN, C. J. Has he not a perfect right to join all who take part in the trespass?] Yes; but he has also a perfect right not to do so. The words "when any defendant," mean any one defendant. [ALLEN, C. J. We are all against you on this point.] As to the other point, about taxation of costs, I objected before the clerk to the sufficiency of the affidavit of witness fees: *Shephard v. Shephard*;¹ *Price v. Harris*.² The affidavit is insufficient, because it does not state that any particular witnesses by name attended the number of days or travelled the number of miles mentioned in the schedule; and it does not allege that the statement is true. It is not competent for Mr. Landry to establish his bill of costs by affidavits here. As to subpoenas, copy and service, I objected that there was no affidavit of service. [WETMORE, J. I have on my notes that the only objection was to the subpoena.] Then I cannot press that point. The plaintiff is only entitled to be paid for writing one letter, at least not without proving that he had written to each defendant. [ALLEN, C. J. As the object of the letter is to give the parties an opportunity of settling without a suit, it would seem that each defendant ought ordinarily to be notified.] I submit that these being new points the Court will not give the costs against me.

Cur. adv. vult.

The following opinions were now delivered:

ALLEN, C. J. We had no doubt during the argument upon the first point in this case, viz.: the right of the defendant, Chapman, to costs, upon his offer to suffer judgment by default. The words "any defendant" in the Act, cannot be read as any one of several defendants. The offer must be such as will entitle the plaintiff to sign judgment and issue execution, and thus to terminate the suit; which could not have been done under the offer made in this case, as the issues raised on the pleas had to be disposed of. It is not like the case of one of several defendants allowing judgment to go against him, by default, for want of a plea. There, no judgment can be signed till the issues joined with the other defendants are tried; and the jury assess the damages against all.

As to the other objections, I think the costs of the entry of

the cause at the circuit when it was made a remanet, were properly taxed on the present occasion, and could not have been taxed before; and we so stated when the present rule *nisi* was granted, in Easter Term last. When the new trial was granted on payment of costs, it was only the costs of that trial in 1878, which could be taxed against the defendants—in the nature of costs of the day—and not any part of the general costs in the cause, the payment of which would depend upon the final decision of the case. *Doe v. Stackhouse*,¹ *Bentley v. Carver*.²

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I have some doubt whether the affidavit of the attendance of the witnesses is sufficient. It does not allege that the statement of the number of witnesses, and their attendance, etc., annexed to the affidavit, is correct—which, I think, should have been stated. But as a majority of the Court think otherwise, the rule will be discharged; and as the question raised under the Statute is new, in my opinion it should be without costs.

WILSON, J. (After stating the facts as above), said:

The first question which arises is, can one of the defendants, in an action of trespass which is charged against them jointly, relieve himself from costs of proceedings in the action, by making an offer and consent to suffer judgment against him?

The section says, "whenever any defendant in any action." Reading this section with the other sections of the Act, it evidently means the whole of the defendants, if more than one, in the action must join in the offer or consent to suffer judgment to be rendered against all. For how can a joint trespasser, or joint debtor, suffer judgment after pleas pleaded by the whole defendants, or confess judgment in such action against him? No judgment could be entered upon such offer or consent so tendered; and therefore to give effect to this section of the Act, (the 127th section) any defendant in the action must be read as at least all the defendants against whom the plaintiff ultimately recovers, where there are more than one in the suit.

The next point as to the costs.—The defendants contend that the cause having been made a remanet at the July Circuit of

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1877, the costs thereof should not have been allowed on the present taxation, but should have been included in the costs taxed when the new trial was granted on payment of the costs, as they were incurred before the granting of such new trial. I am of opinion they were rightly taxed. The case of *Gibbins v. Phillips*¹ settles the point. In that case, a verdict for defendant had been set aside. The record was again carried over to the Spring Assizes 1827, when it was made a remanet. It was tried a second time at the Summer Assizes 1827, when a verdict was again found for the defendant. The court afterwards ordered that that verdict should be set aside and a new trial had upon payment of the costs of the last trial, and that the costs of the first trial should abide the event of such new trial. The costs of that trial (not including those of the remanet) were paid by the plaintiffs to the defendant. The cause was tried again in the Spring Assizes 1828, when a verdict was found for plaintiffs. The master allowed the plaintiffs their costs occasioned by being made a remanet at Spring Assizes of 1827. A rule was obtained to review the taxation on the ground that they were incurred before the first trial. Lord Tenterden, C. J., said:—

“The general rule is that the party who succeeds ultimately, is entitled to the costs occasioned by the cause having been made a remanet. Here the plaintiffs have ultimately succeeded. I think that as the rule made by the Court after the second trial did not provide in express terms for the costs of the remanet, they ought to be considered as costs in the cause, and they were properly allowed as such by the master. The present rule must therefore be discharged.”

This case shews the clerk was right in allowing the plaintiffs the costs of the circuit when the cause was made a remanet.

The affidavit of witnesses attending appears to me sufficient. It states:

“That hereto annexed is a statement of the number of witnesses who attended for me at the trial of this cause in January last past, and also attended at the circuit for me when the same was entered for trial, but not tried, the number of days each attended, and the number of miles one way each travelled.”

The affidavit further states they were material witnesses for him. I am at a loss to see what more was required. I am of opinion the rule should be discharged.

WETMORE and PALMER, JJ., agreed with the Chief Justice, but were of opinion the rule should be discharged with costs.

DUFF and KING, JJ., agreed with the Chief Justice.

Rule discharged without costs.

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EX PARTE WILLIAM ROSS.

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Criminal Law—Jury—Separation of, during trial—What sufficient to avoid verdict—Order under chap. 41 Consol. Statutes—Court can inquire into facts although return shows prisoner to be properly in custody.

October.

The prisoner was tried before the York County Court on a charge of larceny and found guilty. During the trial the jury, while in charge of two constables, were allowed to separate by walking on different sides of the street. One or two other separations of a similar nature were complained of, but there was nothing to show that any of them had any conversation with any person not a juror in reference to the case. This was brought to the notice of the County Court Judge, and an application was made to him to delay passing sentence, and to treat the verdict as a nullity. This application was refused, and the prisoner was sentenced and remanded to gaol, pending his removal to the penitentiary. An order to the keeper of the gaol having been obtained under the provisions of chap. 41 of the Consol. Statutes upon the return of this order,

Held, (by ALLEN, C. J., WETMORE, DUFF, and PALMER, JJ., WELDON and KING, JJ., dissenting), that the separation of the jury was such as to avoid the verdict.

Held, (by ALLEN, C. J., WETMORE, DUFF, and PALMER, JJ., WELDON and KING, JJ., dissenting), that, although the return of the gaoler showed that the prisoner was properly in custody under the sentence of a Court of competent jurisdiction, the Court has power to inquire into the facts of the case, and that the prisoner is not bound to proceed by a writ of error.

The facts of this case appear from the judgments delivered.

An order having been obtained under the provisions of chap. 41 of the Consol. Statutes, directed to the keeper of the gaol of the County of York, upon the return of the order,

October 12th, *Lugrin*, moved for the discharge of the prisoner, on affidavits of himself and William H. Friel, setting forth the facts. [*E. L. Wetmore*, for the prosecution, objected to the reading of Friel's affidavit, on the ground that it was not read before the County Court.] [ALLEN, C. J. It seems to me that if the prisoner is wrongly convicted on that ground, the prisoner has a right to bring all the facts he can before this Court. We will hear the affidavit.] It would be open to the prisoner to apply for a writ of error, but he is not driven to

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that remedy, [PALMER, J., refers to *Graves v. Short*;¹ *Reg. v. Martin*.]² *Rex v. Kinnear*.³ The jury having been allowed to separate we cannot tell how much they were tampered with. It cannot be necessary in such a case to show that the jury have been tampered with. The Statute has expressly provided that in cases of felony the jury shall not be allowed to separate. Hawkins, P. C., book 2, c. 47, sec. 12; Coke, Lit., 227 b.; 1 Chitty, Cr. Law 632, 634; Bac. Abr. Juries M.; *Noble v. Billings*.⁴ [PALMER, J., refers to *Reg. v. Bertrand*.⁵]

E. L. Wetmore, for the prosecution. If this were a proceeding by *habeas corpus*, the prisoner could not avail himself of it. *Rex v. Sheriff of Middlesex*;⁶ Clarke's Cr. Law, 556. The provisions of the Act make this case the same as in the case of *habeas corpus*. The Judge cannot go back of the conviction of a Court of Record having jurisdiction. In *Rex v. Kinnear* the jury separated. [KING, J. That was a misdemeanor, and it was conceded that the practice had been for a long time for juries to separate.] That shows it was not a nullity, because if it had been no length of practice would have altered the rule. Originally the right of jurors to separate was the same in cases of misdemeanor and of felony, and if the verdict had been a nullity the practice could have made no difference, nor would it whether the facts had been brought under the notice of the Court or not. The prisoner's remedy, if any, is by writ of error. [ALLEN, C. J. Would this appear in writ of error?] In *Reg. v. Fowler*,⁷ they got on the record the fact that there had been a second jury. Coming down to the merits no matter how the case can be properly brought before this Court, it should not consider any other material than what was before the Court below. A new trial will not be granted unless it appears that the separation has affected the verdict. Clarke's Cr. Law 599. The jury cannot all sleep in the same room. The law must be construed reasonably.

Lugrin in reply.

Cur. adv. vult.

The following opinions were now delivered.

ALLEN, C. J. The first question is, whether the legality of

¹ Croke Eliz. 616.

² L. R. 1 C. C. R. 378.

³ 2 B. Ald. 462.

⁴ 3 All. 86.

⁵ 10 Cox 618.

⁶ 11 Ad. & E. 273.

⁷ 4 B. & Ald. 373.

Ross's imprisonment can be enquired into, the gaoler's return shewing a sufficient cause for detaining the prisoner, and secondly, if the legality of the imprisonment can be enquired into, whether the verdict of the jury was a nullity in consequence of their separating during the trial, or only an irregularity.

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As to the first question, the sixth section of chap. 41 of the Consol. Stat., under which the application in this case was made, directs that upon the return to his order—

"The Judge may proceed to examine into the legality of the imprisonment, and make such order, and direct such notices or further returns in respect thereof, as he may deem necessary or proper for the purposes of justice."

The return of the gaoler states that the prisoner is held under a conviction on an indictment for stealing, tried in the County Court, and a sentence of imprisonment therefor in the Penitentiary. The affidavits produced on the application do not controvert the truth of this return; but seek to confess and avoid it, by shewing extrinsic collateral facts to impeach the legality of the conviction, as, that the verdict was a nullity, and no conviction could legally take place upon it. In *Clarke's Case*¹ and *Eggington's case*² the right to do this was admitted; see also *Bac. Abr. Habeas Corpus* (B) 11, and I think the power is expressly given by the Act which authorizes the Judge to examine into the legality of the imprisonment. If that meant only an illegality apparent on the face of the warrant or order under which the party was detained, he would have no means of obtaining his liberty, however defective the conviction might be, if the Judge who tried the cause refused to reserve a case for the opinion of this Court, unless, perhaps, by the tedious process of a writ of error.

On the other ground, I think the verdict was bad. The Dominion Stat. 32 and 33 Vict. c. 29, s. 57 enacts, that in all criminal cases less than felony, the jury may, in the discretion of the Court, be allowed to separate during the progress of the trial.

This statute did not introduce any new principle, but was merely declaratory of what the law and the practice in criminal cases had been for a very long time. It was doubted at

¹ 2 Q. B. 619.² 2 E. & B. 717.

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one time whether the Court had even power to adjourn in criminal cases; but the right to do so was determined in *Rex v. Stone*,¹ the jury being kept together in charge of an officer until they had agreed upon a verdict, or were discharged.

I have been unable to find any case where it has been directly decided that the separation of the jury during a trial for felony is a ground for vacating the verdict; but the question was distinctly raised in *Rex v. Kinnear*,² whether such conduct of the jury on a trial for misdemeanor would avoid the verdict; and it was held that it would not. Though it is not stated in express terms in the report of the case in B. & A. that the separation of the jury on a trial for felony would avoid the verdict, that is the clear inference to be drawn from the decision; and the counsel in moving for a new trial stated that the principle prevailed by the universal practice in all cases of felony, which was not dissented from by the Court. In the report of the case in 1 Chit. 421, Abbott, C. J., is reported as having said that the separation of the jury in a case of misdemeanor would not avoid the verdict, as it would if the law required the jury to be absolutely kept together: and in *Reg. v. Charleworth*,³ Compton, J., said, "it is a sacred rule that the jury shall not separate before giving their verdict."

The Statute above referred to, while it recognized the existing practice for the Judge to allow the jury to separate on the trial of misdemeanors, also recognized the contrary practice on trials for felonies, and impliedly declared that in the latter cases the juries should not separate. The principle upon which the law requires the jury to be kept together until they have given their verdict, is, that the verdict ought to be founded only on the evidence, and the directions of the Judge; but if they separate, there is no security that their minds may not be influenced by what they may hear during the time of their separation.

I do not think it was necessary to show that the jurors in this case had conversed with any person during their separation; it was enough that they had the opportunity of doing so. The affidavits clearly show a separation of the jury, and it also appears that some of them conversed with people while they

¹ 6 T. R. 580.² 2 B. & A. 462; 1 Chit. R. 401.³ 1 B. & S. 498.

were in charge of the constables. The manner in which they were allowed to go about the town, shewed either very insufficient arrangements for keeping them together, or great neglect of duty on the part of the constables, who were sworn to keep them, and not to allow any person to speak to them.

The fact that the trial took place before a Court having concurrent jurisdiction with the Judges of this Court in the trial of felonies less than capital, is no reason why the legality of the imprisonment of the party should not be enquired into by this Court. A *habeas corpus* is a writ of right, which the subject may demand, and is the most usual remedy by which a man is restored to his liberty, if he has been deprived of it, against law. *Bac. Ab. Habeas Corpus* (B) 3. And in 3 Bla. Com. 133, it is said that, if probable ground has been shewn that a party is imprisoned without just cause,

“The writ of *habeas corpus* is a writ of right, which may not be denied, but ought to be granted to every man that is committed or detained in prison, or otherwise restrained, though it be by command of the king, the privy council, or any other.”

In *Newton's case*,¹ application was made for a *habeas corpus* to bring up a prisoner who had been convicted at the Central Criminal Court, and sentenced, on the ground that the offence charged was committed out of the jurisdiction of that Court. The writ was refused, not because it was not grantable after conviction—but because the indictment alleged that the offence was committed within the jurisdiction of the Court, which was a material averment, and must be taken to have been proved; and that the record could not be contradicted by affidavits. I cite this case to shew that the fact of a party having been tried and convicted, is not, *per se*, any ground for refusing to enquire into the legality of his imprisonment, on *habeas corpus*. Such applications will probably be of rare occurrence; but if a proper case is made out for the interference of the Court, I am unable to see why a party should not be released from illegal imprisonment at any time.

For the reasons stated, I think the verdict in this case was void; and, consequently, that the prisoner is entitled to be discharged. In coming to this conclusion, I have not overlooked the difficulty of keeping a jury together during the progress of

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a lengthy criminal trial, and preventing any communication with them; but if such is the law, as I think it is, the difficulty of enforcing it is no reason why a prisoner should not be entitled to avail himself of any advantage resulting from a violation of it. Cases may arise, where, from illness or other unavoidable causes, one or more of the jurors would necessarily be required to separate from his or their fellows; but these would evidently be treated as exceptions to the general rule against the separation of jurors in criminal cases.

WELDON, J. This is an application to discharge the party in custody of the gaoler of the County of York, upon the affidavit of Charles H. Lugrin, his counsel and attorney, setting forth that the prisoner was tried in the County Court of the County of York for larceny; that he was convicted and sentenced to the penitentiary at Dorchester for the term of seven years; that the trial occupied several days; that the Court adjourned from day to day and the jury was placed in charge of two constables; that the constables allowed the jury to separate, by walking on different sides of the street; that this was brought to the notice of the Judge presiding in the County Court on an application to delay passing sentence and to treat the verdict of the jury as a nullity; that the Judge was of opinion the application should have been made before the verdict was given. It did not appear nor was it alleged that any of the jury had conversed with persons, outside of their own body respecting the case. The Judge sentenced the party and he is now held in custody for removal to the penitentiary. Upon that affidavit being laid before the Chief Justice, he granted an order to the keeper of the said gaol, according to the provisions of chap. 41 of the Consolidated Statutes, and upon service thereof, a return was duly made by the said gaoler setting forth that the prisoner, William Ross, was received into his custody as gaoler on the 29th day of September last, under and by virtue of a warrant of commitment for that purpose, signed by Andrew Calder and Asa Brooks, Justices of the Peace in and for the County of York; that on the 4th October instant, at the sittings of the County Court of the County, a bill of indictment was preferred by the Grand Jury against the said William Ross, and he was brought into Court by ver-

bal order and tried; that the trial occupied several days, and he was remanded verbally and brought into Court and found guilty of the charge of larceny; that he was remanded by verbal order of the Court, and on a subsequent day brought into Court and sentenced to the penitentiary at Dorchester, for the term of seven years; that he was remanded in open Court to the County Jail and a warrant in the following form was made out:—

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“In the County Court of York,
October Term, 1881.

Monday the tenth day of October, 1881, Court opened at 2 P. M.

<i>The Queen</i>	}	Present His Honor Mr. Justice Steadman.
v.		
<i>William Ross.</i>		

The prisoner being brought into Court, His Honor passed sentence as follows: That the said William Ross be imprisoned in the Dorchester Penitentiary for the period of seven years.

I, Charles H. B. Fisher, clerk of the County Court of York County, do hereby certify, the above named William Ross, having been convicted at the sittings of the said Court, holden the first Tuesday in October instant, of stealing, in the dwelling house of Daniel Schneider, money to the value of one hundred and seventy-six dollars, was, on this tenth day of October instant, sentenced to be imprisoned in the Dorchester Penitentiary for the period of seven years; and I certify that the foregoing is a copy of the sentence passed upon the said William Ross, taken from the minutes of the said Court.

Dated the tenth day of October, 1881.

C. H. B. FISHER,
Clerk York County Court.”

By the return the gaoler further states, that he is the gaoler of the County of York and also Deputy Sheriff of the said County of York; and the said William Ross is now detained in custody in the said common gaol, under and by virtue of the said warrant of commitment; and under and by virtue of the said last mentioned remand of the Judge of the said County Court; and under and by virtue of the said copy of sentence, preparatory to the said William Ross being conveyed to the said penitentiary.

This return being made, the Chief Justice referred the matter to this Court, and we have heard the counsel for prisoner, Mr. Lugin, and he has read an additional affidavit made by him, and also an affidavit of William Friel, one of the con-

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stables in charge of the jury who tried the prisoner, as to what occurred when the constable had charge of the jury. These affidavits do not in the remotest degree intimate the slightest suspicion, that the jurors or any of them spoke to or had communication with any person, outside of their own body in reference to the trial then pending.

The counsel for the prisoner contended that the Court could enquire into the matter under the 2nd sec. of cap. 41, which states:

"The Judge before whom it is returnable may proceed to examine into the truth of the facts set forth therein, and into the cause of such confinement, by affidavit, and may do therein as to justice shall appertain."

This section of the Act states the Court may by affidavit examine into the facts stated in the return, or shall direct an issue for the trial thereof.

I am of opinion this section of the Act does not authorize an enquiry or examination into the matter or facts connected with, or what took place in the County Court. The County Court had authority to try the offence charged, and the prisoner was duly convicted and sentenced, and the return states this, and he is held in custody by virtue of a warrant to convey him to the penitentiary. This is not to authorize the Court to sit as a Court of error and to ascertain whether all the proceedings below are in every respect regular. If the return is sufficient, and shows a conviction by a competent court on an indictment for a criminal offence, I think we cannot enquire into the regularity of the proceedings. These affidavits were objected to on behalf of the Crown, and I think the objection was well-founded.

In the matter of *Parker and others*,¹ the Court say—

"Before granting a *habeas corpus* to remove a person in custody we must ascertain that an affidavit is not reasonably to be expected from him. An affidavit is absolutely necessary either from the party who claims the writ, or from some other person, so as to satisfy the Court that he is so coerced as to be unable to make it."

On this ground the counsel, Mr. Roebuck, on the following day renewed his application on the affidavit of the four prisoners themselves, stating they had never been arraigned, tried or convicted or sentenced by any Court in Canada or elsewhere.

and that they were ignorant of the term for which they were detained. The judgment of the Court was delivered by Lord Abinger, C. B., who said :—

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"This is a case of a *habeas corpus* to the gaoler of Liverpool, on the return to which a motion has been made to discharge the prisoners. The Court is bound to look at the substance of the return; if it contains sufficient matter in substance to shew the prisoner is lawfully detained, we cannot discharge him upon *habeas corpus*, though the return should be in some respects informal, or should go into matter not essential to the question."

In *Carus Wilson's case*,¹ Lord Denman, C. J., after stating what the return to the *habeas corpus* set forth, says :—

"It is proposed to shew by affidavit that the law is untruly set forth. Without enquiring whether any affidavit is receivable at all in the case of any prisoner under sentence, we may decide the question before us by considering the principle of the exception that runs through the whole of *habeas corpus*, whether under Common Law or Statute, namely that our form of writ does not apply where a party is in execution under the judgment of a competent court. If indeed it were proposed to shew that the prisoner had never been before such a court at all, or that no such sentence had been in fact given, there might be a difficulty in saying that a traverse to that effect could not be allowed. But when it appears that the party has been before a court of competent jurisdiction, which court has committed him for a contempt or any other cause, I think it is no longer open to this Court to enter at all into the subject matter."

Abbott, C. J. in *Hobhouse's case*,² in remarking upon the propriety of granting the writ of *habeas corpus* in this case said it was granted in deference to *Rex v. Flower*,³ and added—

"But I think, upon subsequent consideration that we ought not to have granted it, inasmuch as it then appeared, that it could be of no use whatsoever to the prisoner. There is a very elaborate opinion delivered by Lord Chief Justice Wilmot in 1758, in the House of Lords, in answer to a question put by that house whether in cases not within the 31 Chas. 2, c. 2, writs of *habeas corpus*, and *subjiciendum*, by the law as it then stood, ought to issue of course, or upon probable cause verified by affidavit. He then states it to be his opinion that those writs ought not to issue of course, adding that a writ which issues on a probable cause verified by affidavit, is as much a writ of right as a writ which issues of course. And, again at page 87, he says, 'There is no such thing in the law as writs of grace and favor issuing from the Judges. They are all writs of right, but they are not writs of course,' and in page 88, 'writs of *habeas corpus* upon imprisonment for criminal matters were never writs of course; they always issued upon a motion grafted on a copy of the commitment; and cases may be put in which they ought not to be granted.' (1 Lev. 1, Comberb. 74.) If malefac-

¹ 17 Ad. & Ell. N. S. 968.² 3 B. & Ald. 481; 1 Chitty's Rep. 210.³ 8 T. R. 314.

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tors under sentence of death in all the gaols of the kingdom could have these writs of course, the sentence of the law might be suspended and perhaps totally eluded by them. The 31 Car. 2 c. 2 makes no alteration in the practice of the courts in granting them; they are still moved for in term time upon the same foundation as they were before, and when a single Judge in vacation time grants them under 31 Car. 2, c. 2, in criminal cases, a copy of the commitment or an affidavit of the refusal of it must be laid before him."

Our Provincial Statute, provides for a more simple mode. Upon application made to a Judge he issues an order to the party holding a person in custody to return to him a copy of the proceedings under which such party holds the person; saving the necessity of issuing a *habeas corpus*, and upon such return he determines whether the person confined is entitled to be discharged; but I am of opinion such return is the only matter to be inquired into. If it is a conviction for a felony in a court of competent jurisdiction we cannot enquire into these proceedings on such return, for we are not sitting as a court of error.

In *Rex v. Suddis*,¹ the return to a *habeas corpus* was that the defendant was in custody under the sentence of a court of competent jurisdiction to enquire of the offence, and to pass such a sentence without setting forth the particular circumstances necessary to warrant such a sentence.

Lord Kenyon, C. J., says:—

"We are not now sitting as a court of error to review the regularity of their proceedings, nor are we to hunt after possible objections."

Lawrence, J., said:—

"This is a return to a writ of *habeas corpus* made by the person in whose custody the party is placed in execution of the sentence. He cannot be taken to be cognizant of all the proceedings. It is enough that the court had authority to award such a sentence. He returns the cause for which he detains the party in custody, namely, the judgment of such a court."

Grose, J., said:—

"It is enough that we find such a sentence pronounced by a court of competent jurisdiction to enquire into the offence, and with power to inflict such a punishment. As to the rest we must therefore presume *omnia rite acta*."

LeBlanc, J., said:—

"But another objection is that it does not appear the party was charged with the offence of which he was convicted, to which the

¹ 11 East. 806.

answer is, that it is sufficient for the officer having him in his custody to return to the writ of *habeas corpus*, that a Court having a competent jurisdiction had inflicted such a sentence as they had authority to do, and that he holds him in custody under that sentence."

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From all these authorities I am of opinion we cannot receive affidavits of what occurred at the trial. We must take the return of the gaoler, and no objection can be urged to that as to the party being held in custody, for removal to the penitentiary at Dorchester. The same reasons prevent our going outside of a case reserved by the Judge as laid down in *Reg. v. Smith*.¹ There Wilde, C. J., says:—

"You are here only at liberty to argue the question stated in the case upon the facts stated in the case."

The case of *The King v. Woolf, Kinnear and others*,² was cited by the prisoner's counsel, but in that case it was before the same Court, which tried the defendants, and all the facts were before the Court, and the Court held the dispersion of the jury did not vitiate the verdict. It is different on a return to a *habeas corpus*. We can only consider the return which shews the party is held in custody after trial for a criminal offence, and by a court of competent authority to try the same, and we are not at liberty to receive affidavits or try the case over again, or to sit as a court of error to reverse the judgment of the County Court, which we should virtually do by discharging the party now in custody of the gaoler for removal to the penitentiary, pursuant to the sentence of the Court before which he was tried, convicted and sentenced.

If this Court on the return to the order of the Chief Justice could examine into the circumstances occurring on the trial of a prisoner, after he had been convicted and sentenced by a court of competent authority, upon affidavits of the prisoner's counsel and a constable sworn to attend the jury, upon something which it is contended was an irregularity, where are we to stop? It will apply to Courts of Oyer and Terminer as well as County Courts. The line must be drawn that after a conviction and sentence in a competent Court, the law does not allow a *habeas corpus* to be granted or the party to be discharged on such an application. I am therefore clearly of

¹ 2 C. & K. 884.² 1 Chitty 428; 2 B. & Ald. 462.

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opinion the prisoner cannot be discharged by *habeas corpus*. No case has been reserved by the Judge who tried the prisoner, and we have no authority to discharge the prisoner under chap. 41 of the Consol. Stat.

WETMORE, DUFF and PALMER, JJ., agreed with the Chief Justice.

KING, J. The prisoner is in execution upon a conviction in the County Court, on an indictment for larceny, and he applies for his discharge on *habeas corpus*, on the ground that the verdict is a nullity, by reason of the alleged separation of the jurors on adjournments prior to their retirement to consider of their verdict. There are two questions; the one as to whether the writ lies at all in such case, and the other as to the effect of the facts upon the verdict. On the first point my impression is that, after a conviction on indictment and sentence by a Court having jurisdiction of the person and the offence, a prisoner is not entitled to the benefit of the writ, nor (which in my view is the same thing) to the order under our Act; but I express myself with hesitation, in view of the importance of the question, the different opinion of so many of my brethren, and the insufficient consideration that I have been able to give to this part of the case. On the other point also I feel compelled to differ from my learned Chief Justice and those of my brethren who are agreed on the discharge of the prisoner. The law of course is that, on a trial for a felony, the jurors shall not be allowed to separate, and it was assumed rather than decided in the case of *Rex v. Woolf*, less fully reported in 2 B. & A. 462 under the name of *Rex v. Kinnear*, that the separation of the jury in a case of felony renders the verdict a nullity. Admitting the law to be so, a question arises as to the meaning of the rule. The case of *Rex v. Woolf* was a case where the jury were not placed in charge of the officers of the Court at all, but dispersed and retired to their homes. They were in no sense in charge of the officers of the Court, and it may, I think, be taken that it was in reference to such a separation that it was assumed that the separation of the jury nullifies the verdict. Throughout the case the terms dispersion of the jury and going at large of the jury are used as expres-

sive of the separation of the jury. Then take the Act 32-33 Vic, c. 29, sec. 57, providing that in all criminal trials less than felony, the jury may, in the discretion of the Court, and under its direction as to conditions, mode and time, be allowed to separate during the progress of the trial. It seems to me that this clause is dealing with what is technically known as the separation of the jury, and not at all with the way in which constables are to discharge their duties, and means that, subject to the discretion and direction of the court, the jury (in cases less than felony and during adjournments prior to their retirement for deliberation) shall not be kept in charge of the officers of the court, but shall be suffered to go at large. Now this use of the term separate in the Act indicates its meaning in the rule. In a case from the year books cited in a note to *Rex v. Woolf*, it is said that when a jury is charged, that is to say, when after being sworn, and the indictment and plea being read to them, the prisoner is delivered in charge to the jury, they are as it were prisoners until they are discharged. In this view the allowing a jury to go at large freed from all control of the court or its officers might be deemed to amount to a breaking up or discharge of the tribunal, and so, render its verdict a nullity, whilst less than this would be mere irregularity or misconduct not interfering with the competency of the tribunal. In *Rex v. Stone*, A. D. 1796, a case of treason, referred to in the notes to *Rex v. Woolf*, the jury had leave to withdraw to an adjoining tavern where accommodations were prepared for them, and six bailiffs were sworn to keep them, and neither to speak to them themselves nor suffer any other to speak to them touching any matter relative to the trial. The swearing of six bailiffs might seem to point to a division of the jury into several bodies, and the oath requiring the bailiffs not to speak to them, nor suffer any other person to speak to them *touching any matter relative to the trial* shows that complete isolation is not required. A very different duty is imposed after the evidence is all in, and the jury have retired to deliberate. Then they are not merely to be kept, but they are to be kept together, and the oath is that the bailiffs shall keep them together, and suffer no one to speak to them, nor speak to them themselves unless to ask whether they have agreed upon their

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verdict, without leave of the court, and in this respect the law is the same in civil as in criminal cases, in misdemeanors as in felonies or treason. A verdict may therefore very well be held a nullity in the latter case upon facts which in the former case would at most be an irregularity. But even here the law is not clearly settled. Two years after the case of *Rex v. Woolf* was decided, the same court composed of the same judges, decided the case of *Rex v. Fowler*.¹ The prisoner had been twice convicted of a felony before the Court of Quarter Sessions. The first verdict had been declared a nullity by the Court of Quarter Sessions, and a *venire de novo* awarded on the ground that after the jury had been given in charge to a bailiff, and had retired to deliberate one of the jurors separated from his fellows and conversed respecting his verdict. On error brought after the conviction on the second trial, the Court of King's Bench treated the nullity of the first verdict as an open question. They put it in this way, that one or other of the verdicts was good without deciding which, and affirmed the judgment on the whole record. As *Rex v. Woolf* was not referred to in any way, it seems to me that the court must have considered the rule as to separation referred to in *Rex v. Woolf* inapplicable to a case where the jury are placed under the charge of an officer of the court.

In *Reg. v. Murphy*,² decided in 1869 a verdict against the prisoner on a trial for murder had been set aside by a colonial court, and a *venire de novo* awarded on the ground that during adjournments prior to the retirement of the jury they were allowed by the officer having charge of them to have access to and free perusal of certain newspapers containing reports of the evidence and comments thereon. On appeal to the judicial committee the order for a new trial was reversed. Sir William Earle in delivering judgment, said:—

“The cases in which a verdict upon a charge of felony has been held to be a nullity, and a *venire de novo* awarded have not been classified in the digests. There are cases of defect of jurisdiction in respect of time, place, or person, cases of verdicts so insufficiently expressed or so ambiguous that a judgment could not be founded thereon, but we have not discovered any valid authority for holding a verdict of conviction or acquittal in a case of a felony delivered by a competent

¹ 14 B. & A. 273, (A. D. 1881.)² 12 B. & P. C. 25.

tribunal in due form of law to be a nullity, by reason of some conduct on the part of the jury which the court considers unsatisfactory."

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And again :

"If irregularity occurs in the conduct of a trial not constituting a ground for treating the verdict as a nullity, the remedy to prevent a failure of justice is by application to the authority with whom rests the discretion either of executing the law or commuting the sentence."

Now, what is complained of here? The trial lasted several days,—during adjournments the jury were in charge of two constables sworn to keep them, and the alleged separation occurred prior to the retirement of the jury to consider of their verdict. One of the matters complained of is, that on one occasion, during an adjournment, three of the jurors were allowed to go up the street in charge of one of the two constables, whilst the other jurors remained at the hotel where they were lodged in charge of the other constable. Another complaint is that, on another occasion, one of the jurors went in charge of one of the two constables to attend to some private business, that did not, however, bring him into contact with other persons, the other jurors remaining in charge of the other constable. However reprehensible the conduct of the constable in allowing a juror to attend to private business, without leave of the Court, it amounted to nothing more than contempt of Court, and did not affect the competency of the tribunal. In both cases the jurors were in actual charge of the constables, and there is, in my opinion, nothing on principle or authority that requires us to consider a division of the jurors into two or more bodies during an adjournment, prior to their retirement to deliberate, so long as the several divisions are in fact in charge of constables appointed to keep them, as destructive of the competency of the tribunal.

Another complaint is that one of the jurors was sick in his room, in the hotel where they were lodged, whilst the others were elsewhere in the hotel in charge of the constables, but I regard such juror as still in charge of the constables as much as if he had retired for some necessary purpose. Another matter of complaint is that, on one occasion, when the jurors were leaving the hotel in charge of the constables, a number of them came out before the rest and went in a body to the opposite side of the street, and stood at an open square in an

1881. unfrequented place separate from other persons, and, as must
Ex parte be concluded, in sight of the constables, until they were very
 Ross. soon afterwards joined by the constables and the rest of the jurors. Here, too, I think the jury must be considered as in charge of the constables. It is simply a question as to the degree and mode of control exercised by the constables in whose charge the jury were placed, and who undoubtedly did claim to exercise control, and did in fact exercise certain control. It is not alleged that the jurors had any communication with others touching matters relative to the trial, and no wrongdoing is suggested, much less proved. In this case the jurors were not only given in charge to sworn constables, but they were in fact kept in charge by such constables, whatever may be thought of the laxity of the control, and therefore, in my opinion, there was no separation of the jurors. Unless there is a clear principle of law that compels us to treat this verdict as a nullity, I think we should hesitate in doing what, if followed, will, I am afraid, make a long criminal trial very difficult. The tribunal being once properly constituted, is not to be broken down unless there is a fixed rule of law, capable of certain application requiring this to be done, and in my opinion, there is no such fixed rule of law applicable to this case.

Motion for the prisoner's discharge granted.

1881.

KINNEAR, APPELLANT v. BLACK, RESPONDENT.

October.

Appeal from County Court—Where abandoned by appellant and notice given—Motion to dismiss, with costs refused—Power of County Court to give costs.

Where the proceedings on an appeal from a County Court had been certified and filed with the Clerk of the Pleas, but the case had not been entered on the appeal paper, an application to dismiss the appeal with costs for failure to prosecute was refused (by ALLEN, C. J., and WELDON and KING, JJ., WETMORE and PALMER, JJ., dissenting), the appellant having previously given notice that he abandoned the appeal, and the respondent having a remedy by application to the Judge of the County Court, under Consol. Stat. c. 51, s. 52.

Wells, for the respondent, on a former day moved to dismiss the appeal in this case with costs.

It was an appeal from the County Court. The proceedings had been certified by the Judge of the County Court, and filed

with the Clerk of the Pleas, but had not been entered on the appeal paper, as directed by the rule of Mich. Term 1876. It appeared by the affidavit read in support of the motion, that the appellant had given notice to the respondent that he did not intend to proceed with the appeal. [WETMORE, J. You might have applied to the County Court Judge for leave to proceed. ALLEN, C. J. I do not think it was necessary for you to come here. You might have applied to the Court below.]

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Cur. adv. vult.

ALLEN, C. J., now said :—I think this application was quite unnecessary. The 52nd section of the County Court Act, (Con. Stat. c. 51), makes provision for the respondent getting his costs by applying to the Judge of the County Court, if the appellant does not prosecute his appeal according to the practice of this Court. An application to this Court in such a case as this, only increases the costs for no purpose. I think it ought not to be granted.

WELDON and KING, JJ., concurred.

WETMORE, J. I think the respondent is entitled to have the appeal dismissed, and the fact that he could have applied to the County Court Judge is no ground for refusing the application.

PALMER, J. I did not hear the argument, but I wish it to be understood that on the question of practice I agree with my brother Wetmore.

Application refused.

LA BANQUE VILLE MARIE v. LORDLY, ET AL.

1881.

Endorsement on envelope enclosing depositions—What sufficient entitling of cause—Consol. Stat. c. 37, s. 194.

October.

The parties to the action were *La Banque Ville Marie*, plaintiff, and *Albert J. Lordly* and *Sterling B. Lordly*, defendants. The depositions taken under a commission were returned addressed to the court, and endorsed *La Banque Ville Marie v. A. J. Lordly, et al.*

Held, that the endorsement was not sufficient.¹

This cause was tried before Mr. Justice King, at the March Circuit in Saint John, 1881. On the trial the plaintiff offered

¹ See Consol. Stat. c. 37, s. 194.

1881. in evidence depositions taken under a commission. The parties
 LA BANQUE to the suit were *La Banque Ville Marie*, plaintiff, and *Albert J.*
 VILLE MARIE *Lordly* and *Sterling B. Lordly*, defendants. The envelope in
 v. which the depositions were returned to the court was directed
 LORDLY. to the court, and had on it the endorsement, *La Banque Ville*
Marie v. A. J. Lordly, et al. Objection being made that the
 envelope was not properly endorsed as required by the Consol.
 Stat. c. 37, s. 194, and therefore the evidence taken under the
 commission ought not to be received, the depositions were read,
 leave being reserved for the defendants to move to enter a non-
 suit on that ground.

Oct. 19, 1881. *Harrison* now moved for a nonsuit or a new
 trial. The Act requires the depositions to be closed up under
 the seal of the judge, commissioner, or other person taking the
 same, and endorsed with the title to the suit in which the same
 were taken. It is not in the Judge's discretion to say whether
 it will be opened or not, the Act is imperative. 5 Wm. 4, c. 34,
 did not contain this provision, nor did the Com. Law Proc. Act
 1873. Prior to the Consol. Statutes it was not necessary that
 the names of the parties appear upon the envelope enclosing
 the depositions. He cited *Raymond v. Caldwell*;¹ *Doe dem.*
James and wife v. McLaughlin;² and *Waterhouse v. The New*
Brunswick Marine Assurance Company.³

W. W. Allen, contra. The provision is only directory. The
 court should take a liberal view of the matter. The require-
 ments of the Act were substantially complied with. He cited
Hodges v. Cobb;⁴ *Greville v. Stultz*;⁵ *Howkins v. Baldwin*;⁶
Doe dem. Heathcote v. Hughes.⁷

Cur. adv. vult.

WETMORE, J., now said :—

This cause was tried at the Saint John Circuit, and a
 verdict found for the plaintiff, with leave reserved for a non-
 suit to be entered upon two points. The first ground was
 that the address of the envelope, containing the depositions
 used in evidence on the part of the plaintiff was improper; the
 second that the entitling of the depositions was improper.

¹ 6 All. 56.
² 5 All. 54.
³ 3 Kerr, 689.
⁴ L. R. 2 Q. B. 652.

⁵ 11 Q. B. 297.
⁶ 16 Q. B. 375.
⁷ 2 P. & B. 250.

The motion made was to enter a nonsuit upon leave reserved and also for a new trial. The question for determination depends entirely upon the reception of the evidence under a commission. By the *nisi prius* record, the cause being tried was *La Banque Ville Marie v. Albert J. Lordly and Sterling B. Lordly*. The evidence offered under the commission was enclosed in an envelope, duly sealed and directed to the Supreme Court of the Province of New Brunswick, with the endorsement "*La Banque Ville Marie v. A. J. Lordly et al.*" The objection arises upon the defendants' designation, it being A. J. Lordly et al., whereas in the cause being tried the defendants were, by the *nisi prius* record, Albert J. Lordly and Sterling B. Lordly. The commission enclosed was properly entitled, as also the evidence taken under it.

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James and Wife v. McLaughlin,¹ cited on the argument, was an extreme case of error. The depositions were entitled in the Supreme Court of *Nova Scotia*, instead of New Brunswick, and the lessors of the plaintiff were given as Hugh James and *Heatly Ann*, instead of Heatly W. as in the commission. In giving judgment, Ritchie, J. said:—

"I should be glad to help the plaintiff if I could, but I cannot get over the fact that the Statute only authorizes the commission to issue in a particular case. Here it appears the evidence was taken in a cause between different parties and in a suit pending in *Nova Scotia*."

In *Hodges v. Cobb*,² cited on the argument, the Judge's order ordering a commission to issue, contained a clause that "the depositions of every witness be signed by him and the commissioner." The writ of commission contained no such clause. The commission was duly executed and the depositions returned without the signature of the witnesses. It was held that the clause in the order was merely directory, and non-compliance with it did not render the evidence inadmissible. In *Doe dem. Heathcote v. Hughes*,³ it was held where depositions taken under a commission are directed to the Court, enclosed in an envelope, as directed by the Consol. Stat., cap. 37, sec. 194, and sealed up, it will be presumed that the seal is that of the commissioner who took the deposition.

By the 194th section it is enacted that—

"No examination or deposition to be taken by virtue hereof shall

¹ 5 All. 54.

² L. R. 2 Q. B. 652.

³ 2 P. & B. 293.

1881. *be read in evidence* at any trial, without the consent of the party against whom the same may be offered, unless it shall appear to the satisfaction of the Judge, on proof by affidavit or *viva voce*, that the examinant or deponent is out of the Province, or dead, or unable from sickness or other infirmity to attend the trial; in all or any of which cases the examinations and depositions certified under the hand of the Judge, Commissioner or other person taking the same, shall and may, without proof of the signature of such certificate, be received and read in evidence saving all just exceptions: *Provided always* that such examinations or deposition shall be closed up under the seal of the Judge, Commissioner or other person taking the same, and addressed to the Supreme Court, and endorsed with the title to the suit in which the same were taken, and shall not be opened before the trial without the consent of the parties to the suit."

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The section seems to me to be imperative. The depositions are only allowed to be read in evidence in certain cases. The wording of the section is they *shall not* be read in evidence unless the statutory requirements are complied with, and I think the proviso is one of them, to be as effectually considered as if the Statute had in words said, the examination or deposition shall *not be read* in evidence, unless the paper or envelope containing them shall be endorsed with the title to the suit in which the same were taken. The endorsement in a suit *La Banque Ville Marie v. A. J. Lordly et al.*, is not, in my opinion, such an endorsement in a suit of *La Banque Ville Marie v. Albert J. Lordly and Sterling B. Lordly* as the section requires; Chit. Arch. (8 ed.) 1447. If there be a cause in Court the affidavit in support of it or in opposition to a motion respecting it, must also be entitled in the cause stating the christian names as well as the surnames of all the parties, otherwise it cannot be used. Entitling *T. v. G. and others* would be bad; *Tomkins v. Geach*; ¹ *Doe d. Pryme v. Roe*; ² *Doe v. Welsford*.³

It would be idle to express regret that I am unable to arrive at a different conclusion. I have only to state the law as I understand it, and I cannot get over what seems to me to be a positive requirement of the Statute, that must be complied with before the depositions can be read in evidence. I have therefore to give, as my opinion, that there should be a rule absolute to enter a nonsuit, it having been agreed on the trial that if the evidence was improperly received, the defendant should have leave to move to enter a nonsuit.

¹ 5 Dowl. 509.

² 8 Dowl. 240.

³ 7 Scott 172.

ALLEN, C. J. and WELDON, DUFF, PALMER and KING, JJ.
concurred, the Chief Justice stating that he did so with great
reluctance, being compelled by the words of the Statute.

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Rule absolute for nonsuit.

RECORD v. RECORD AND BOYER.

1881.

November.

Execution—Priority lost by instructions to sheriff—Confession signed by one partner for himself and his co-partner—With co-partner's consent—One partner acknowledging service of summons for himself and co-partner with latter's consent—Summons filed without affidavit of service—Irregularities—Third parties cannot take advantage of, in absence of fraud—Confession signed May 2nd, authorizing judgment to be signed on "the fifth day of May next"—When due.

Where an execution was placed in the sheriff's hands with instructions to make a *pro forma* levy, but not to advertise and sell, or do anything more until he received further instructions, it was held by ALLEN, C. J., and PALMER and KING, JJ., that the execution was not delivered to be executed within the meaning of the Statute of Frauds, (Consol. Stat. c. 76, s. 11), and therefore did not bind the goods of the defendants; but by WELDON and WETMORE, JJ., that the direction to the sheriff not to proceed to advertise and sell until further orders, was not such an interference with the execution as would give subsequent executions priority.

R. & B. co-partners, were indebted to A.: B. being about to go away consented that a confession should be given to A., and authorized R. to sign his name in his absence. R. accordingly signed B.'s name to the confession, and afterwards, on B.'s return, informed him of what he had done, to which B. replied "that is all right."

Held, (by ALLEN, C. J., and WELDON and WETMORE, JJ., PALMER, J., dissenting), that this was a sufficient recognition of the confession to prevent B. from objecting to it, and certainly sufficient to prevent any one else from taking a similar objection.

R. for himself and B., acknowledged service of the writ of summons, which was filed. No affidavit of service was made, no appearance was entered, and no declaration was filed; judgment was entered up on a confession signed by R. for himself and B., with B's consent, the judgment roll being duly filed. The judgment creditor was R's father, and the proceedings were in the nature of a friendly arrangement.

Held, (by ALLEN, C. J., and WELDON and WETMORE, JJ., PALMER, J., dissenting), that these were matters of irregularity only, of which subsequent judgment creditors could not take advantage, in the absence of fraud.

Held, by KING, J., that although there was no evidence of actual fraud, the proceedings by the preferred creditor against the preferring debtors amounted to an abuse of the process of the court, and that the judgment ought to be set aside unless the plaintiff so amended his proceedings as to bring them into uniformity with the practice of the court.

Where judgment is entered up for more than is due from the defendant to the plaintiff, the court will, on the application of a subsequent judgment creditor of the defendant, reduce the amount of the judgment: by ALLEN, C. J., and WELDON and WETMORE, JJ.

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Where a confession dated the 2nd day of May, 1881, authorized judgment to be signed on "the fifth day of May next." it was held by ALLEN, C. J., and PALMER, J., that this meant the fifth day of May, 1882; but by WELDON and WETMORE, JJ., that as it was evident the parties meant the fifth day of May instant, and the error was clerical, the plaintiff was entitled to sign his judgment on the 5th of May, 1881. This objection not being taken before the Judge who referred the matter to the court, ALLEN, C. J., was of opinion it ought not to prevail.

The defendants Record and Boyer, co-partners in business, were indebted to the plaintiff, Record's father. Record spoke to Boyer, his partner, who was about to go out of the Province, about giving a confession to the plaintiff, to which Boyer consented, telling Record to sign his name to any papers that were necessary. The plaintiff caused a writ of summons to be issued, on which Record for himself and Boyer acknowledged service, but no affidavit of service was made. No appearance was entered and no declaration filed. On the second day of May, 1881, Record signed a confession for himself and Boyer, authorizing judgment to be entered up on "the fifth of May next." Judgment was signed on the sixth of May, 1881, and an execution placed in the hands of the sheriff of Westmorland, with instructions to make a *pro forma* levy, but not to proceed to advertize or sell the defendants' property without further orders. In June, 1881, the Bank of Montreal, the Bank of Toronto and James DeG. Stuart recovered judgments against the defendants, and placed executions in the hands of the sheriff of Westmorland with instructions to levy. Subsequently *W. J. Gilbert* for the Banks and Stuart applied to Mr. Justice Palmer to set aside the plaintiff's judgment and execution as irregular, fraudulent and void, and to order that the plaintiff's execution should lose its priority over the executions of the Banks and of Stuart. Mr. Justice Palmer referred the matter to the Court. The facts are set out at length in the opinions of Mr. Justice Wetmore and of the other Judges.

Oct. 12, 13 and 14, 1881. *W. J. Gilbert* moved to set aside the judgment and execution on the grounds:—1st. That the judgment was void under 13 Eliz. c. 5 and 27 Eliz. c. 4; 2nd. That it was not signed in conformity with the practice of the Court, and would be set aside at the instance of the defendants; 3rd. That Boyer being out of the jurisdiction when the summons was issued and judgment signed, the proceedings were void and subsequent ratification by him could not affect the

rights of subsequent creditors; 4th. That as Boyer was not served with summons, the execution was issued against him contrary to the Statute: Consol. Stat. c. 37, s. 122; 5th. That the entry docket was filed contrary to the Statute, there being no affidavit of service, or Judge's order: Consol. Stat. c. 37, s. 38; 6th. That as the clerk had no right to file the entry docket without such affidavit, there was no cause in Court and proceedings were void; 7th. That filing a declaration is a condition precedent to making up a judgment roll: Consol. Stat. c. 37, s. 43 and 48; 8th. That the confession was a nullity, there being no declaration on file; 9th. That there was no judgment docket as required by the Statute: Consol. Stat. c. 37, s. 114; 10th. That judgment by confession without appearance is a nullity: Consol. Stat. c. 37, schedule A, No. 1. He also moved that the applicants' executions have priority over that of the plaintiff, by reason of the instructions given to the sheriff by plaintiff's attorney.

C. A. Palmer, on the same side, raised a further objection, not raised before Mr. Justice Palmer, that the judgment had been signed before it was due; that the words on "the fifth day of May next" in the confession, meant the fifth day of May, 1882. The following cases and authorities were referred to:—*Simple v. Nicholson*; ¹ *Mitchell v. Lawther*; ² *Muldoon v. Beveridge*; ³ *McAuley v. Geddes*; ⁴ *Robinson v. N. B. & Can. Ry. and Land Co.*; ⁵ 1 Arch. Prac. (12 ed.) pp. 218, 219; *Hackin v. Hassells*; ⁶ *Davis v. Hughes*; ⁷ *Saunders v. Harding*; ⁸ *Brooks v. Hodgson*; ⁹ and *Miller v. Weldon*. ¹⁰

C. A. Steeves, *contra*. The objections to the judgment are irregularities, and no one but the defendants can take advantage of them: *Lynott v. Seely*. ¹¹ If Boyer authorized Record to sign his name to the confession before he went, it is enough, or if he ratified it afterwards it is sufficient. Even tacit acquiescence would do. He referred to *McNamee v. O'Brien*; ¹² *Hutchinson v. Johnston*; ¹³ *O'Regan v. Berrymount*; ¹⁴ *O'Leary v. Graham*; ¹⁵ *Morley v. Hall*; ¹⁶ *Clark v. Jones*; ¹⁷ *Doe dem. Barlow v. Hatfield*; ¹⁸ *Robinson v. N. B. and Can. Ry. and Land Co.*; ¹⁹

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¹⁸ L. J. Ex. 217.¹¹ Pag. 79.¹² Kerr 532.¹³ All. 520.¹⁴ All. 620.¹⁵ D. & L. 1006.¹⁶ T. R. 206.⁹⁵ T. R. 9.⁹⁷ M. & G. 529.¹⁰¹ Han. 576.¹¹¹ All. 35.¹²⁴ All. 548.¹²⁴ All. 40.¹⁴¹ Kerr 167.¹⁴⁵ All. 105.¹⁴² Dowl. 494.¹⁷³ Dowl. 277.¹⁸¹ Kerr 417.¹⁹⁵ All. 680.

1881. *Calhoun v. Colpitts*;¹ *Hamilton v. Bryson*;² *Crane v. Clarke*;³ *Gladstone v. Padwick*;⁴ *Nash v. Dickenson*;⁵ and
RECORD. *Wright v. Childs*.⁶

Barker, Q. C., on the same side. The applicants must shew actual fraud or legal fraud, as that the judgment was signed to defeat or delay creditors. The application to set aside the judgment, on the ground that the execution of the applicants is entitled to priority, is premature, for there has been no sale and there are intermediate executions which may require all the proceeds to satisfy them. There was no case of actual fraud put forward before Mr. Justice Palmer, and there is really no fraud or evidence of fraud: *Semple v. Nicholson*.⁷ The great majority of Mr. Gilbert's objections to the judgment are mere irregularities, and cannot be taken advantage of by the applicants. The date of the confession is clearly a clerical error, and upon no principle can it be taken advantage of by these parties, and should be allowed to be corrected on affidavit.

W. J. Gilbert, in reply.

Cur. adv. vult.

The following opinions were now delivered:—

PALMER, J.⁸ I think the judgment in this case should be set aside on the following grounds:—

1st. That the confession upon which it is entered is not yet due and it only authorizes the entry of a judgment, if the money is not paid by the fifth of May next, and this condition has not yet been broken.

2nd. That the signature of Boyer to such confession was not authorized by him, and he never ratified it until after this application.

3rd. That when such confession given, there was no cause of action set out in any proceeding in this cause, and the confession itself does not show what cause of action was confessed, and therefore cannot authorize a judgment for a particular cause of action specified in the record. The judgment might as well have been entered for a trespass or on a bond or any

¹ 15 All. 382.

² 1 Han. 629.

³ Chip. MSS. Hil. T. 1828.

⁴ L. R. 6 Ex. 208.

⁵ L. R. 2 C. P. 252.

⁶ L. R. 1 Ex. 368.

⁷ 28 L. J. Exch. 217.

⁸ In Mr. Justice Palmer's absence, this opinion was read by the Chief Justice.

thing else; such would have been as much authorized as the present judgment. It is impossible for the court to tell by the confession itself what is the cause of action intended to be confessed.

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4th. The record recites the defendant appeared, and that the plaintiff declared against him, when in fact there never was any such appearance made, and I do not think there can be a judgment without a declaration showing what is the cause of action recovered for, and that the defendant was in court, or that he was served so that the plaintiff would be authorized by the Statute to enter an appearance for him. If there had been a proper confession, I think this could have been remedied by application for leave to file a declaration *nunc pro tunc*; but even this could not be allowed to interfere with executions that had been issued in the meantime. See *Semple v. Nicholson*.¹

5th. Although I think there is evidence to shew that at the time of the giving of the confession the defendants owed the plaintiff \$7,000 and not \$10,000, the amount for which the confession was given, under all the evidence I have no doubt but that it was not given for the sole *bona fide* purpose of securing the plaintiff's debt, really due him, but the main purpose of all parties who took part in having it entered up was to hinder and delay the applicants, the defendants' creditors in recovering their claim, and that this was the motive that influenced the defendant Record to procure this judgment to be entered up. The evidence satisfied me that he was the only person who really directed and controlled the transaction, and his object was to defeat the defendants' creditors, when, according to his own account, there was in his father's (the plaintiff's) and in his brother-in-law Harris's hands enough property to pay all those debts, and thus leave the defendants' property to pay the plaintiff's claim, if he had any.

6th. I also think that the applicants' execution would have priority over the plaintiff's even if his judgment stood, for that execution was not put into the sheriff's hands to be executed. For the sheriff was directed not to proceed to realize under it until he received further orders, which orders he never received.

As the property is tied up in the hands of the sheriff and

¹ 28 L. J. Exch. 217.

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great injury will result if any considerable delay occurs before the court delivers their judgment, and although I think that any one of the above grounds is fatal to the plaintiff's contention, my taking the time properly to discuss them all would result in injury to the property, and as the decision of the first point, if against the plaintiff, would give all the applicants require, I have concluded to confine the reasons I now give to that question. The confession on which alone the judgment is founded is dated the second of May last, the same day I believe on which the writ in this cause was issued, and authorizes the plaintiff to enter the judgment in case the debt confessed (\$10,000) was not paid on the fifth of May next. The very words of the confession are "on or before the fifth day of May next," and there is no pretence of any authority to enter that judgment except what is contained in that confession. The applicants contend that the plain, literal, certain and grammatical meaning of these words are "the fifth day of the month of May," or, in other words, of May then next; and I have come to the conclusion that it is quite impossible that the words themselves can mean any thing else; and the only thing that I think I am authorized to look at, that is, the whole of the writing in which they occur, contains nothing which would throw the slightest doubt upon such meaning. The word May is simply the name of a month, and its exact equivalent is the month of May, and the words May next are the exact equivalents of next May, and taken together they exactly mean, the next month of May; and to attempt by oral or other evidence to show that it was the then present month of May, instead of the next month of May, would be clearly contradicting and altering the writing, and be the plainest contradiction of the maxim of the common law, "*Quoties in verbis nulla est ambiguitas, ubi nulla expositio contra verba fienda est.*"

The rule is thus plainly laid down by Bayley and Holroyd, JJ., in *Williams v. Jones*.¹

"Where an instrument appears to be complete on its face parol evidence cannot be admitted to vary or contradict it. In such cases the court will look to the written contract in order to ascertain the meaning of the parties, and will not allow the introduction of parol evidence to show that the agreement was in reality different from that which it purports to be."

But this very point was decided by this court upon the construction of a promissory note in the case of *Calhoun v. Colpitta*.¹ In that case the note was dated twenty-fourth August, and the words were "interest from August last," and the court decided this could only mean the month of August in the previous year and interest was allowed from that time although the defendant was prepared to shew that what was really intended was the first day of the month of August, in which the note was given. So that case is an authority not only that this is the proper construction, but that such construction cannot be affected by any evidence *dehors* the instrument itself. But if the rule were otherwise there is nothing in this case to show that it was agreed that judgment was to be signed at any other time than that expressed in the confession; no agreement was proved upon the subject except what the writing proves. From the other evidence I am satisfied that this confession was intended to defeat and delay the applicants, who could be delayed no longer in entering their judgments, and from this I infer that the defendant Record, who concocted it intended the judgment to be entered at once, for in no other way could it serve that purpose. If, however, I am wrong in the inference, there is absolutely nothing else to show that the defendants ever consented that the judgment should be entered before the expiration of the term named in the confession. But it is said that this can only be taken advantage of by the defendants themselves, and they have waived it, and in my opinion if the money was due on this confession before the applicants obtained their judgments, and the plaintiff was entitled to have his judgment before the applicants had theirs, then they could not have complained; but this confession is not yet due, and the plaintiff not only has judgment and execution in the sheriff's hands but a memorial registered which is not and may never be authorized. In my opinion such a proceeding cannot be sustained against subsequent judgment creditors. The reason is, there is no debt yet due, and there is nothing to authorize the judgment; and the use of the process of the court to levy money not due and thereby to defeat creditors whose debts are due, would, I think, be an abuse of the process of this court, I therefore think

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¹ 5 Allen, 882.

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that the judgment and execution in the cause should be set aside, and the plaintiff should pay the costs of this application.

KING, J. The view I take of this case renders it unnecessary that I should express an opinion on most of the matters argued; but as actual fraud was charged against the plaintiff, I ought perhaps to say that I have come to the conclusion, that the applicant entirely failed to prove fraud, and I think that he should pay the costs occasioned by his attempt to prove it. But on the whole I think the applicant entitled to succeed in obtaining priority for his judgment. The judgment in the principal case was admittedly very irregularly obtained. Now the learned counsel for the plaintiff did indeed succeed in showing that the several omissions, one by one, are mere irregularities. But what in the single instance and in a case between real litigants is mere irregularity, may, if multiplied, and where the whole proceedings are as much in the nature of a friendly arrangement as of an actual suit, amount to an abuse of the procedure of the court. Where the parties are real litigants, the process of the court is protected from abuse and regularity secured by the opposite interests of the parties, but in such a case as this is proved to be, there is no such check upon irregularity, and if there were no authority I think we might well make one to prevent it from being entirely a matter between a preferring debtor and a preferred creditor, as to whether the practice of the court shall or shall not be observed. It is conceivable that otherwise the only thing on the court records, to indicate an action between such parties, might be a judgment roll and a judgment docket, and without the least chance of any objection from the defendants in the action. I am therefore of opinion, that the plaintiff should be required to amend his proceedings so as to bring them into conformity with the practice, and that on failure to do so his judgment should be set aside, but that such leave to amend should be without prejudice to judgments heretofore regularly obtained, and that these should have priority over the amended judgment, and that the applicant's execution should have priority over the plaintiff's execution.

WETMORE, J. The plaintiff has a judgment in this cause

for damages confessed,.....	\$10,000	1881.
Costs,.....	30	RECORD
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upon which execution has issued. The applicants are also judgment creditors of the defendants, upon judgments signed subsequently to the plaintiff's, and they have executions in the sheriff's hands, but received by him subsequently to the execution upon the plaintiff's judgment.

Summons was obtained on 11th July, 1881, from Mr. Justice Palmer, with stay of proceedings under the plaintiff's execution, requiring plaintiff to shew cause why the judgment signed in this cause on 9th May, 1881, and the execution to render the amount therein named, with interest, and \$2.00 for said execution, directed to the sheriff of Westmorland, should not be set aside for being illegal, irregular, fraudulent and void, or why said sheriff should not be directed to treat said execution as having been withdrawn by the plaintiff, from him, and why the executions issued at the suit of the Bank of Montreal and the Bank of Toronto, against the said defendants, and the execution at the suit of, (the summons is here so interlined that I cannot make it out) or why such other order should not be made in the premises as the justice of the case requires, for the several reasons and upon the several grounds disclosed, by the several affidavits and documents thereto attached read upon obtaining summons. An affidavit of George C. Peters, the deputy sheriff whose evidence was taken before Mr. Justice Palmer, is attached, in which he states in reference to the execution, that he received it about 11th May, last, from Mr. Steeves, plaintiff's attorney; that while he held it he did not advertise or sell under it until 23rd of June; that early in June, having received other executions against defendants, he made an inventory of their property, not removing it but putting it in charge of Wm. Riffey, an officer for that purpose; that the reason why he did not put an officer in possession under the execution was, that plaintiff's attorney, Chipman A. Steeves, on delivering the execution, requested him merely to make a levy but not to proceed on and advertise defendants' property for the present time, and not until he was further in-

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structed, and in pursuance of such request a formal levy was made, but no further steps whatever to realize or take charge of said property until after other executions were received against defendants, which were received early in June, and then the inventory was made and a person put in charge.

It may be important to bear in mind, that the subsequent executions, which caused the inventory and putting a person in charge, were received early in June—about the 10th. There is an affidavit of Mr. Wm. J. Gilbert, in which he states that, on 9th of June, 1881, judgment was recovered against the defendants at the suit of the Bank of Montreal for \$2,159.24 and a *fi. fa.* was immediately issued by him and delivered to the sheriff of Westmorland to be executed (Mr. Gilbert leaves the time of issue and delivery of the execution to be gathered from the word immediately, without giving the exact date); that on said 9th of June another judgment was recovered against defendants at the suit of the Bank of Toronto for \$1,412.85 on which an execution was duly issued by him, as plaintiff's attorney, on 11th June, and was thereupon *immediately* delivered to said sheriff to be executed; and on 14th of June another judgment was recovered against defendants, and one Jonathan Wier at the suit James De Gaspe Stuart for \$3,403.11, and an execution was immediately issued, and on or about 15th of June was delivered to the sheriff of Westmorland to be executed; on 13th of June, on search at sheriff's office, he found three executions to have been previously placed in the sheriff's hands against the defendants: one at the suit of the plaintiff on the 11th of May; one at the suit of ——— on the 2nd of June indorsed to levy \$892.60 with interest; one at the suit of James Warwick on same day indorsed to levy \$285.31 with interest; one at the suit of Edwin Fisher on same day indorsed to levy, besides sheriff's fees, \$522.25 with interest; one at the suit of Robert Wood on 8th of June indorsed to levy \$170.68 with interest; one at the suit of Alami Lawton and others on the day last aforesaid for \$236.14 with interest, etc., on 7th July instant (this probably was intended for 7th June); that on 7th July he searched in the clerk's office and found no affidavits of service or acceptance thereof, of the summons issued, or any declaration on file in said office in above cause. He states his belief that the

signatures to acceptance of service of summons, and those to the confession, to have been written by the same person. He states that plaintiff is father of one of the judgment debtors, and states his belief that the judgment and execution are wrongfully and illegally recovered and issued, and that the execution has no priority and should be set aside, and unless they are set aside his clients will lose all benefit from their respective judgments and executions.

Examinations of a number of witnesses was had *viva voce* before Mr. Justice Palmer, under sec. 174 of cap. 37, Consol. Stat., page 266, and he handed the matter up to the court.

The summons commencing this suit was issued 30th April, 1881; service of summons was acknowledged by indorsement thereon: "We hereby accept service of the within writ, May 2nd, 1881, Edwin A. Record, Robt. F. Boyer." Both these names were signed by the defendant Record, Boyer being beyond the jurisdiction of the court at the time. There was no affidavit of service, nor was there any declaration filed. Judgment was signed on a confession dated 2nd of May, 1881. The confession, entitled in the cause, was as follows—

"We confess this action, and that the plaintiff hath sustained damages to the amount of ten thousand dollars, besides his costs and charges to the amount of thirty dollars, to be taxed by the clerk, and in case we shall make default in the payment of the said debt and costs on the fifth day of May *next*, the plaintiff shall be at liberty to enter up judgment for the same, and also for the further costs of entering up said judgment, and may forthwith sue out execution, and levy for the amount of such judgment, together with interest, cost of execution, memorials, officers' fees, sheriff's poundage, costs of levying and other incidental expenses, and we hereby undertake not to bring any writ of error, nor file any bill in equity, nor do any other matter or thing whatsoever, to delay the said plaintiff in entering his said judgment, or suing out execution thereon, as aforesaid. Dated the second day of May, A. D. 1881.

(Signed.) EDWIN A. RECORD,
ROBT. F. BOYER.

Both these signatures were written by the defendant Record, the other defendant being beyond the jurisdiction of the court.

The grounds upon which the applicants' counsel, Mr. Wm. J. Gilbert, relied for sustaining the application are as follows :

- 1st. The judgment was void under 13 Eliz. c. 5, and 27 Eliz. c. 4.
- 2nd. The judgment was not warranted by the practice, is void, and applicants can take advantage of it.

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3rd. Defendant, Boyer, being without the jurisdiction of the court when judgment was signed and process issued, the proceedings were void, and his subsequent ratification will not help.

4th. Boyer not having been served with process the execution is void under sec. 122 of Consol. Stat., cap. 37.

5th. The filing of the entry docket without an affidavit of service is contrary to the Statute, s. 38.

6th. As there was no entry docket, which the clerk had a right to file, the cause is not in court.

7th. Filing a declaration is a condition precedent to signing judgment : ss. 43 and 48.

8th. At the time the confession was filed there was no declaration on file shewing a cause of action to which it is applicable.

9th. There was no judgment docket as required by Statute: s. 124.

10th. Judgment by confession without appearance is a nullity.

11th. This execution is inoperative, was withdrawn, and has lost its priority by reason of instructions from plaintiff's attorney.

I shall deal with the 2nd, 5th, 6th, 7th, 8th, 9th and 10th objections first. It is very clear the irregularities complained of exist, and unless the defendants have waived them, the judgment could likely be attacked with success. The proceeding was, if I may use the term, an amicable one. The defendants entirely consenting to the plaintiff's obtaining judgment, and no doubt with the express intention of his getting an execution in the sheriff's hands before other suitors who were proceeding could get their judgments perfected.

A summons issued, service of it was acknowledged by the defendant, Edwin A Record, for himself and the other defendant, he signing both their names, the cause was entered, and confession and judgment roll filed, but a declaration was not filed. Sec. 38 of cap. 37 points out the practice. It says, the plaintiff may, on filing the writ of summons with an affidavit of service, and on due entry of the cause file declaration indorsed with notice to plead in twenty days, and in default of appearance within twenty days after declaration filed may sign judgment by default. Then follows the practice to be observed by the defendant in case he appears. This statutory practice must be followed to enable the plaintiff to obtain judgment, but there is nothing that I am aware of to prevent the defendant waiving such of it as he can control. The entry of the cause probably he cannot control, but I think he can waive the necessity of an affidavit of service of summons. See the fol-

lowing authorities upon waiver generally: *McPhelim v. Larsen*; ¹ *Campbell v. Lowden*; ² *McNamee v. O'Brien*; ³ *Ex parte Coll*; ⁴ *Woodward v. McRae*.⁵

The entry docket I think sufficient under rule of Easter Term 25 Geo. 3., Stev. Dig. 471, No. 92.

As to filing declaration (objections No. 7 and 8) to entitle the plaintiff to proceed adversely no doubt this is a necessary proceeding, but I think the filing or service of a copy can be waived. Suppose a party is defending a suit, and no declaration filed or even copy served, and by consent or otherwise he pleads, and a *nisi prius* record is prepared and the defendant tries the cause out at *nisi prius*, can he then fall back upon the want of filing of declaration, if unsuccessful on the trial? I apprehend not. See *McNamee v. O'Brien* previously mentioned. In the judgment of the court it is said that—

"We think the defendant's case is fully answered and that it is not open to defendant now to object to the regularity of the judgment, for want of appearance on file or because the declaration was not filed until judgment was signed, or because there was no declaration filed when the *cognovit* was signed. Giving *cognovit* will preclude the defendant from objecting as an irregularity that the plaintiff has not filed common bail in time, according to the Statute: *Davis v. Hughes*.⁷ In *Webb v. Aspinall*,⁸ it was held that as it was the constant practice to allow judgment to be entered upon a *cognovit* on the supposition that a declaration had either been filed or delivered the court would decide in conformity to that practice. See also *Lee v. Thurston*.⁹ In *Morley v. Hall*¹⁰ it was decided that it was not necessary to declare previous to a *cognovit*: Arch. Pr. 845. A *cognovit* may be given at any time after the process is sued out, and even before it is served: *Clark v. Jones*.¹¹ These cases shew that the not filing the declaration or other papers would not in this case be material."

The judgment then proceeds to a very proper disapprobation of practising upon understandings between attorneys, as being in direct contravention of the rules of court and dangerous to suitors. This case I have quoted from freely, and I think it determines the question in reference to the declaration, in case of confession, and I think also ss. 43 and 48 of Consol. Stat. c. 37 do not make any change.

The judgment docket is I think sufficient so far as the applicants are concerned.

¹⁴ All. 71.
²¹ All. 439.
²⁴ All. 648.
²⁸ All. 48.

⁵ Stev. Dig. (12 ed.) 1023.
⁶ 4 All. 649.
⁷ 7 T. R. 208.
⁸ 7 Taunt. 701.

⁹ 1 Chit. Rep. 267, (n.)
¹⁰ 2 Dowl. 494.
¹¹ 3 Dowl. 277.

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As to the want of appearance (10th objection), under the old practice the necessity of common bail existed to a much greater extent than can now be allowed to prevail.

The filing of common bail was done away with by 21 Vic. cap. 20, sec. 4, Acts 1858, page 68, and by 36 Vic. cap. 31, Acts 1873, page 97, sec. 36; it is provided that it shall not be necessary in any case for the plaintiff to enter an appearance for the defendant. This chapter is repealed by Consol. Stat., cap. 120. By sec. 34 of cap. 37, a mode of appearance by a defendant is given, but by sec. 36, it is enacted that it shall not be necessary in any case for the plaintiff to enter an appearance for the defendant.

As to objections three and four—It appears a conversation took place between the defendants, before the defendant Boyer left for Prince Edward Island, respecting giving the plaintiff a judgment so as to secure him in advance of other creditors, who were likely to obtain judgments, and I think Boyer, from that conversation, gave the co-defendant ample authority to sign the necessary papers to affect that object: *Farley v. Phillips*.¹ At all events on his return he was informed of what had been done, and said it was all right. After adopting the confession, I think it was not in his power to say he had not been served with process: *O'Leary v. Graham*.²

These objections are mere irregularities. It appears from *Lunt v. Estabrooks*,³ that assignees of an insolvent debtor, under 7 Vic. cap. 32, have a sufficient interest to entitle them to apply to the court to set aside a judgment on a warrant of attorney, given by the insolvent to a third person, *but they cannot take advantage of the irregularities in the judgment, which have been waived by the debtor before the assignment*. A subsequent judgment creditor of the defendant has no right to complain of an irregularity, in the plaintiff's judgment, as that it was signed too soon. It is only in case of fraud that a subsequent creditor can apply to set aside a judgment: *Robinson v. N. B. and Canada Railway and Land Company*.⁴ I cannot see why a subsequent judgment creditor should be in a better position as regards a prior judgment creditor.

Then as to one of the defendants signing the confession for

¹ Ber. 347.² 5 All. 105.³ 3 Kerr 144.⁴ 5 All. 630.

his co-defendant.—It is quite evident the defendant Boyer knew a judgment was to be given in favor of the plaintiff—to which he assented before leaving for P. E. Island, and on his return he was informed the judgment had been signed, and he expressly assented to it. His words when informed of it were, it is all right. In *Hutchinson v. William Johnston and Robert Johnston*, a bond and warrant of attorney was executed in the name of A and B, and judgment signed thereon. It was held that, as the warrant of attorney need not be under seal, a judgment signed thereon would bind B, *if he recognized it*, though A had no authority to execute it. The present case goes further, as there was the understanding that the judgment was to be given, and the defendant Boyer, on being informed, before leaving, by the co-defendant, his co-partner, that the judgment was contemplated, gave his consent and assented to his co-partner signing his name. The signing was no doubt to the necessary papers for carrying out the proposed giving of judgment, and he unquestionably assented to it on his return. During the argument, Mr. Palmer, for the applicants, raised an objection, which was not suggested by the leading counsel in stating his objections, nor was it dreamed of in the proceedings before Mr. Justice Palmer, the happening on it being evidently a pure accident. The objection was that the confession dated 2nd of May, authorized a judgment to be signed on the 5th of May next, and therefore no judgment could be signed under it until 5th of May, 1882. It was the intention on giving the confession, that the judgment was to be signed on the 5th of May then instant, and if the defendants had applied to set the judgment aside on this ground, (having been signed too soon) they would have been met by what was unquestionably the fact, that the May next was a clerical error, that could not be taken advantage of by the defendants. To overturn the judgment on this ground would be a great injustice. The applicants are in no better position than the judgment debtors. Before the applicants can ask the court to extend equitable justice to them, they must be prepared to do equity, as a party applying for the equitable interference of the court must do equity: *Hutchinson v. Johnson et al.*¹

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If the applicants are not disposed to do equity, the court must, as far as possible, do it themselves, and what equity would there be in the court countenancing this objection, when it was the obvious and avowed intention of all parties that the time mentioned in the confession for signing judgment was the 5th of May then instant, and by a pure mistake, that might very easily happen, May next was inserted. In *Robinson v. The N. B. and Canada Ry. and Land Co.*,¹ previously mentioned, where application was made by a judgment creditor of the defendants, to set aside a judgment for irregularity, it having been signed too soon, the application was refused. Ritchie, J., said:—

“You cannot take advantage of the irregularity; the defendant can only move to set aside a judgment for irregularity. It is the old question of a penny a day. You get your judgment as soon as you are entitled to it, and what right have you to complain if another person has got his judgment too soon, unless the defendant complains of it? [*Rainsford*. It interferes with Belcher's judgment; he has a right to complain.] Ritchie, J. That is nothing. It is only in case of *fraud* in a judgment that a subsequent judgment creditor can apply to set it aside.”

Then as to fraud.—The case, in my opinion, is encumbered with a mass of most irrelevant matter. The defendants were in partnership and the plaintiff's dealing with them, and upon which he has his judgment, was simply with them. While in partnership they, with one Wier, entered into another business, quite distinct from that of Record & Boyer, (the defendants' firm) and the latter business was known as that of The Moncton Car Company, composed of Boyer, Record and Wier. The Moncton Car Company got into difficulty, and assigned the property of the Moncton Car Company, together with a contract they had with the Dominion Government, to the plaintiff and the Messrs. Harris. In the proceedings before Mr. Justice Palmer, a volume of evidence was taken, only connected with this Car Company's business, which I cannot see has the least reference to the dealings between the plaintiff and the defendants alone. It may be said this evidence was taken in order to shew fraud and to connect it with the dealings between the plaintiff and the defendants. I can only say, after carefully considering the evidence, that I see no fraud in the dealings

connected with the Car Company, nor any connection between the defendants or plaintiffs and the Car Company, to affect this judgment in the slightest degree, and the matter must be decided upon the dealings between the plaintiff and defendants alone. As before stated, there is no doubt, indeed it is not denied but is affirmed, that the confession was given that the plaintiff might get priority over other creditors, who had instituted suits against the defendants. It was decided in *Kinnear et al v. White et al*,¹ that an assignment of goods is not necessarily void, though the intent and effect of it may be to defeat an execution, if the assignment be made *bona fide*. At page 241 Chipman, C. J., said:—

“There is no rule of law independent of the positive enactments of the Statutes in the case of bankruptcy and the like, which prevents a man from preferring one *bona fide* creditor to another: *Benton v. Thornhill*.² The same principle, I should suppose, would apply to confessing a judgment.”

The several affidavits of the defendants, of James Robb, the plaintiff's bookkeeper for seven or eight years, and that of the plaintiff, used before Mr. Justice Palmer, shew an indebtedness from the defendants to the plaintiff of \$11,489.76, with a credit of \$993.44, leaving a balance due plaintiff of \$10,496.32. I make the sum, in adding up the several sums stated \$11,540.26, some \$50.50 more than plaintiff has stated it. In the items are \$200 loaned the defendant Record, an item of \$102.78 for interest on a sum of \$1300, and a further sum of \$33.72 for interest on a sum of \$900. These sums are no doubt included in the amount of the judgment. Though the defendants appear to be owing more than the \$10,000, I do not see that any agreement to pay interest is put forward, therefore I think these three sums \$200, \$102.70 and \$33.72, in all \$336.42, should be deducted from the amount directed to be levied, which will leave the plaintiff's debt to be levied \$9,663.58. *Secord v. Green*³ decides that the amount can be reduced. I observe the plaintiff giving evidence from his books says, the account is brought down to 28th April, 1881; another book shows as due plaintiff \$8,671.77 on which credit is to be given for \$993.44, which would leave due \$7,678.33, but this amount does not include two cash items, one of \$1300, the other \$900 which he

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has included in his judgment; and I think properly. If any doubt exists as to the actual amount, the utmost I should think the court would be disposed to do under the circumstances would be to order an issue to ascertain the amount, or require further proof of the amount. For my own part, I am satisfied from what is before the court that the plaintiff's claim as stated is fairly due.

I am unable to discover any fraud in the transaction. As to the transfer of the house to Robertson, and by Robertson to the wife of the defendant Record, I see no fraud in this transaction, as explained. It appears the plaintiff conveyed the property to his son the defendant; it was worth some \$4,000; subsequently the plaintiff conveyed his foundry and plant to his son worth some \$1,500, no consideration paid to him, as a present in fact; but the son was to convey the house to his wife, this was as stated, so understood between father and son; and it was conveyed through the medium of Robertson; a deed direct from her husband would not have been of much avail. This appears a fair transaction; at all events I think it should not weigh with the court adversely to the plaintiff's interest in the present application. Nor do I think the fact of the relationship of father and son should of itself induce the court to view the transaction with any suspicion whatever.

This brings me to the important question as to the plaintiff's execution retaining its priority, or whether it must give way by reason of the instruction given to the sheriff by the plaintiff's attorney. Mr. Peters, the deputy sheriff, in reference to the directions given by Mr. Steeves, the plaintiff's attorney, in the affidavit which the applicants presented to Mr. Justice Palmer, *and which they therefore adduce as their evidence*, in paragraph 5, says, in the month of June last (about the 10th), having received other executions against defendants he made an inventory of defendants' property, but did not remove the same, putting it in the hands of Wm. Riffey. In paragraph 6, he says the reason why he did not sooner put an officer in charge of said property, and proceed on and advertise and sell said personal property, was, that upon receiving execution in this cause, Steeves the plaintiff's attorney, *requested* him merely to make a *pro forma* levy but not to proceed on and advertise

and sell the defendants' property at that time, and not until he was further instructed, and in pursuance of said request thus made, he made said *pro forma* levy, but took no further steps whatever to realize or take charge of said property until after he received the other executions against the defendants.

Mr. Peters, in his evidence taken before Mr. Justice Palmer, says, on 2nd June, he received two more executions in the morning and two in the afternoon, and levied generally on 11th May, making no inventory at the time. He made an inventory on the 4th June. In answer to the question, by whose directions he acted, he said Mr. Steeves told him to make a levy, and on 2nd June he told him to go on and sell, and under these instructions he went on, and made the inventory for the purpose of executing the writ. On cross-examination he said when Steeves gave him the writ he told him to make a levy and let the thing stand and remain until further orders, in consequence of which instructions he delayed advertising and selling, but made a *pro forma* levy in consequence of these instructions; he simply went up to the foundry, and levied on everything in the foundry under that execution, and told him to make an inventory of what was in his house, and he would go up and levy on that; this was on the 11th June (this should probably be May); he did not proceed on and advertise in consequence of the instructions from the plaintiff's attorney, and delayed in doing anything further until he received the other executions. After receiving them, he saw the plaintiff's attorney, and told him he had them and expected more. Mr. Peters says he thinks Steeves said, "I will see Mr. Record before I give my instructions. I think you had better go on and sell: but however I will go and see Mr. Record." These, he says are the very words he used, as well as he could tell. Mr. Steeves did not give any further instructions.

Mr. Steeves, in his affidavit used before Mr. Justice Palmer, says, that the reason for requesting the deputy sheriff, at the time of handing him the execution, not to advertise and sell at that time, was, the defendants had information that there was a large balance due from the Dominion Government upon a contract made with them and one Jonathan Wier and the Government, which they expected to receive in a short time, and as

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soon as received they would be in a position to arrange all claims against them without having their property sold, and wished him not to press the matter against them, until the matter was arranged with the Government; that as soon as he ascertained that there was no immediate prospect of the matter with the Government being settled, he at once directed the deputy sheriff, to advertise and sell the property of defendants to satisfy the execution. This is the evidence in reference to the instructions.

In *Crane v. Clarke*,¹ mentioned in *Stev. Dig.* 203, it was decided that an execution put in the sheriff's hands with instructions not to levy on it, unless it should become necessary to prevent another execution from taking precedence, will not bind the goods of the defendants nor defeat a purchase of them, before a seizure actually made under the execution.

In *Hunt v. Hooper, et al.*,² the plaintiff having obtained judgment against Ward on 7th June 1843, issued and delivered an execution with directions to issue a warrant immediately. On the following day a seizure took place under that writ. Before plaintiff's writ had issued, namely on 14th June 1843, one Bird had obtained a writ of *fi. fa.* against the goods of Ward with directions to execute it, suggesting the following morning as the best time for that purpose, but no direction was given not to execute it until that time. In the meantime Ward requested Bird to stay the execution, and promised him £50 if he would do so. Bird in consequence verbally desired defendant to suspend the execution, and on the 2nd June 1843, gave them a written notice not to execute the writ until further orders. On 9th June, the £50 not having been paid by Ward, Bird required defendants to proceed with the execution, and the bailiff entered but found another bailiff in possession under the plaintiff's writ. The learned Judge left the question to the jury. They found that Bird's writ was, in the first instance, intended to be executed, and not suspended until the following morning. Judgment was for defendants. On motion to enter verdict for plaintiff, in the judgment at page 628, it is said:—

"The plaintiff's counsel contended that Bird's writ ought to have

¹ *Chlp. MSS. Hil. T. 1828.*

² *1 D. & L. 626, 12 M. & W. 664.*

no preference, although it was first delivered to be executed, as such execution was afterwards countermanded, and *while* such countermand was continued, the writ must be considered as not delivered at all, to be executed, *because the plaintiff could not act upon it*, and that the second order to execute it could give it no priority. * * * On full consideration, we are of opinion that the plaintiff's argument is well founded. * * * The plaintiff's answer is that when the writ was delivered, the defendants had received orders not to execute the former writ, and which consequently they had no right to execute, and would have been trespassers if they attempted to do so, and therefore could not legally seize or sell under that writ."

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These authorities clearly shew that where instruction is given not to execute the execution, or what shall be considered as such instruction, a subsequent execution will prevail against the execution with regard to which the instructions are given. But in the present case the execution was, as far as I can judge, placed in the sheriff's hands for the purpose of realizing the plaintiff's claim. No doubt subsequent executions were expected, and the plaintiff expected his execution to take precedence, and it may be that precedence was everything in the operation, nevertheless the plaintiff was entitled to all advantages the law would allow him. It appears to me, however, that the mere request to the sheriff not to proceed to an advertizing and sale, was not such an interference with the execution of the writ as would give a subsequent execution priority. The plaintiff did not interfere with the levying. A levy was made by his direction. The levy I think was a *bona fide* one, made with view of carrying out the execution, and was not a mere colorable one. He merely requested that an advertisement and sale should not take place until further orders. The reason for the delay is given in the affidavit of the plaintiff's attorney. There was no waiver of the levy, on the contrary, it was directed no doubt for the purpose of securing the benefit of the execution. I cannot see that there was any intention of waiving the plaintiff's strict rights under the execution, and the matter of intention can be considered: *Johnson et al. v. Crocker*.^o

As to the judgment of Stuart against the defendants and Wier, for \$3,403.11, the execution was not delivered until 15th June, and it is quite evident that if directions from the plaintiff

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to proceed were necessary, they were given on the 2nd of June; so this execution should not be allowed precedence over the plaintiff's, whatever conclusion may be arrived at with reference to the others.

As there are irregularities in the plaintiff's proceedings, and there may be, upon accurate calculation, a reduction of the amount directed to be levied of some \$136.43, leaving the amount of debt \$9,963.58, I think the application should be refused without costs on either side.

WELDON, J. This is an application made by Mr. W. J. Gilbert, on behalf the Montreal Bank and others, to set aside the judgment in this cause and the execution issued thereon, and give the several parties having placed executions in the hands of the sheriff of Westmorland, subsequent to the plaintiff, priority over the plaintiff's execution.

The affidavit of W. J. Gilbert, upon which a summons was issued by Mr. Justice Palmer, does not state any facts upon which Mr. Gilbert founds his belief, of any fraud committed by the plaintiff in obtaining his judgment against the defendants, to warrant the applicants in making such application. The learned Judge has proceeded under the 37 cap. Consol. Stat., ss. 173, 4 and 5. A great deal of evidence has been taken and I have carefully attended to the reading thereof, by the counsel, Mr. Gilbert, and I am unable to discover any fraud on the part of the plaintiff, to justify the Court in setting aside his execution. The testimony of Thomas Robb, the book-keeper of the defendants, clearly shews that they were indebted to the plaintiff, and the balance of upwards of \$500 on a settlement, and the plaintiff states indebtedness of the defendants of \$11,400, from which \$990 is to be deducted as having been received by him. This is not deemed nor is there any evidence to shew there is not this sum due from the defendants to the plaintiff, and unless some fraud is shewn, I am of opinion the applicants are not in a situation to impeach the judgment of the plaintiff, on account of some irregularity, and the court cannot act upon the belief of the applicants' counsel in the affidavit so made. I have not had time to go into the grounds of some contract with the Government, which the defendants had a claim for, and is mixed up with Harris and

some other parties, but I fail to understand how that contract can be brought into the matters between the parties in this cause.

My brother Wetmore has gone fully into the matter; with his judgment I mainly concur. I agree with him that this rule ought to be refused, no sufficient facts appearing to justify the court in interfering.

ALLEN, C. J. At the time the execution in this case was delivered to the deputy sheriff on the 11th May, it was not, in my opinion, delivered "to be executed," within the meaning of the Statute of Frauds (Consol. Stat. p. 699, s. 11) and therefore did not bind the goods of the defendants. The instructions to the officer were to make a *pro forma* levy, but not to advertise and sell, or do anything more till he received further instructions. The term "levy" means, technically, to raise or collect the money; but in the instructions to the officer in this case, it was evidently used in the colloquial sense, as meaning merely a seizure. It is very clear that if an execution is placed in the sheriff's hands with such instructions as were given in this case, and before any further instructions are given to him respecting it, another execution against the defendant at the suit of another judgment creditor is lodged to be executed, the second execution will have priority. *Hunt v. Hooper*; ¹ *Crane v. Clarke*.² In this case, before any further instructions were given (namely on the 2nd June) executions against the defendants at the suit of other creditors were delivered to the deputy sheriff at Moncton, who informed the plaintiff's attorney of this fact, and that he expected other executions, and also stated that it was a heavy matter, and he would not take the responsibility of it, but would telegraph to the sheriff to come and attend to it. The attorney said he thought that would be a proper course for the deputy to take, and added, "I think you had better go on and sell; but, however, I will go and see Mr. Record." No further instructions were given to the deputy sheriff. On the following day, the 3rd June, the sheriff came to Moncton, and a conversation took place in the attorney's office. There is no affidavit of the sheriff or of the plaintiff's

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¹ 12 M. & W. 604.² Chlp MSS. Hil. T. 1823.

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attorney as to any directions given on the occasion; but the deputy sheriff states as follows:—

“There was just a conversation,—nothing particular took place, further than that the sheriff and I decided to go over in the morning and sell off everything. Steeves (plaintiff's attorney) did not give me or the sheriff any specific instructions, as I can recollect. I went up next morning, and made an inventory of everything, but did not advertise for sale, and so far, it has not been advertised for sale that I know of. All I did was to take the inventory of the stock. I had no further talk with Steeves upon the subject. I think it was decided at the meeting in Steeves' office, that we would merely take an inventory, and let the thing stand. * * * I don't think I would sell from the instructions from Steeves, until I got instructions from the sheriff.”

After this on the 9th, 11th and 15th June respectively, executions against the defendants at the suit of the Bank of Montreal, and the other creditors on whose behalf this application was made, were delivered to the sheriff. The instructions given to the deputy sheriff, when the execution in this case was delivered to him, were equivalent to a withdrawal of it for the time; and the order which he then received not to advertise and sell till he received further instructions, do not appear ever to have been countermanded, or any positive direction afterwards given to proceed. What was said to him by the plaintiff's attorney on the 2nd June, left the matter just as it was before. It was at most a mere expression of opinion as to what the attorney thought the officer had better do; and even this was qualified by his statement that he would see the plaintiff about it, clearly conveying to the officer that he need not act under this execution till he received further instructions. Having once, in effect, withdrawn the execution, the attorney could not give vitality to it again without express directions to proceed with it; and such directions he never gave, either to the deputy or, so far as appears by the evidence, to the sheriff; for nothing was done then but to take an inventory of the defendants' property. I therefore think the execution in this case was not delivered to the sheriff *to be executed*, and consequently, that it is not entitled to priority over the executions of the Bank of Montreal, and the two other contesting creditors.

With respect to the judgment. In the view which I have taken of the execution, it is probably unnecessary to consider the objections to the judgment; but I am inclined to think it

has not been shewn to be fraudulent. The defendants appear to have been indebted to the plaintiff in a large amount, nearly, if not quite, equal to the sum for which the judgment was given; and the plaintiff asked for a judgment to secure his debt. In the absence of fraud in the transaction, if the whole amount was not due, it would certainly be in the power of the court to reduce the amount to be levied under the plaintiff's execution: *Lunt v. Estabrooks*.^o But, inasmuch as the plaintiff's execution has lost its priority, the amount for which it could properly issue, is not now a matter of much importance.

Another point affecting the judgment, was the right of the defendant Record to sign the confession for Boyer, the other defendant. I have examined the evidence on this point and I think it establishes that the matter of giving a judgment to the plaintiff was talked of between the defendants, and that Boyer said it would be a proper thing to do, and authorized Record to sign his (Boyer's) name to any papers that were necessary to be signed in his absence; and that after Boyer returned to Moncton, Record told him that he had given the confession, and Boyer approved of it. This is a sufficient recognition of the confession to prevent Boyer from objecting to it, and certainly sufficient to prevent any other person from taking a similar objection: *Hutchinson v. Johnston*.^o

The other objections to the judgment, (except that it was signed too soon) are, I think, matters of irregularity only, which subsequent judgment creditors cannot take advantage of. No doubt the proceedings have been, in some respects, very irregular, but I am not prepared to say that they are such as to render the judgment a nullity.

As to the objection that the judgment was signed before the debt was due. If this had been one of the points taken on the application to set aside the judgment, I should have thought that it must prevail, unless evidence could be received (which I doubt), to shew that it was not intended that the words, "fifth day of May next," should mean what they necessarily import; for I entirely agree that the proper construction of them is that contended for by the counsel for the contesting creditors. The case of *Calhoun v. Colpitts*,^o was decided on

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¹³ Kerr 144.²⁴ Allen 40.²⁵ Allen 302.

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this principle. But as no such objection was taken when the application was made to Mr. Justice Palmer, nor even when the present application was made and the points stated, I think it ought not to prevail now.

If, in consequence of a memorial of the judgment being registered, it is material for the subsequent creditors of the defendants to get rid of that judgment, I think an issue should be directed to try the *bona fides* of it, and that the creditors should have an opportunity of applying to the court for that purpose.

I think the opposing creditors are entitled to the costs of this application so far as relates to their obtaining priority over the plaintiff's execution; but not necessarily, to the costs of all the proceedings before Mr. Justice Palmer, a very considerable part of which related to the transactions of the Moncton Car Company and their dealings with plaintiffs, and Messrs. J. & C. Harris, which apparently were not so connected with the validity of the plaintiff's judgment as to require such an investigation as took place here. It may be, however, that these matters were necessarily gone into, and that the creditors are entitled to the costs of them. This question will properly come up on the taxation of costs.

The rule will be that the executions of the Bank of Montreal and the other opposing creditors, are entitled to priority over the plaintiff's execution, and that the plaintiff pay the costs of this application.

Judgment accordingly.



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October.

TOWER v. OUTHOUSE.

Application to amend rule—Discharged without costs.

On demurrer to defendant's plea, there was judgment for the plaintiff, with leave for the defendant to amend on payment of costs.¹ The defendant did not amend, and plaintiff applied to have the rule amended by striking out that part which allowed defendant to amend. After the rule *nisi* was granted the parties went to trial.

Held, that the application was unnecessary, and the rule was discharged, but without costs, as the rule was taken out without costs, and could not be made absolute with costs and there was no necessity for the defendant to shew cause.

A rule *nisi* calling on the defendant to shew cause why the

words "or the defendant have leave to amend on payment of costs" should not be struck out of a rule for judgment for the plaintiff on demurrer to the defendant's plea having been granted in Hilary Term last, on,

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October 21st, 1881, *Blair* shewed cause. This motion is entirely unnecessary. The original rule allowed the defendant to amend his plea, if he paid the costs. If he did not choose to do so, there was an end of the matter.

E. L. Wetmore, in support of the rule. We must look at the case as it stood at the time the application was made, and I think it is clear the plaintiff was justified in coming to the court, to have that part of the rule discharged. There was no time fixed in which the defendants were to amend and they were evidently playing with the plaintiff, and they had to get rid of the right in the defendants to amend. If the rule is discharged it should be without costs.

ALLEN, C. J. The rule was unnecessary and need not have been taken out. I do not say that it would in no case be proper to make application for a rule for this purpose. I think, as the rule was not moved with costs it could not be made absolute with costs, and there was no need of the defendant appearing to show cause, if he did not mean to amend. I think the rule should be discharged, each party paying his own costs.

WELDON, J. Since the rule was granted the defendants have gone to trial. The rule should be discharged without costs.

WETMORE, J. I am not prepared to say the plaintiff was not justified in making this application, though perhaps it was not prudent to do so. I think the conclusion of the Chief Justice is correct, and the rule should be discharged without costs.

DUFF, J. I am of the same opinion.

¹ *Rule discharged without costs.*

¹ PALMER and KING, JJ., were not present.

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SCOTT AND WIFE v. PALMER.

October. *Sheriff's sale—Bidding by plaintiff who had forbidden sale not evidence of leave and license—Measure of damages—Evidence.*

In an action of trespass by the husband and wife against the defendant, sheriff of Queens, for taking the property of the wife under an execution against the husband, the defendant, on the trial, was allowed to add a plea of leave and license. The evidence offered to support the plea was the fact of the female plaintiff having attended the sheriff's sale and bid in some of the goods. She had previously forbidden the sale, and the defendant in his evidence stated he took the goods and sold them under the execution. It also appeared that she purchased the goods at a low price, no one bidding against her. The Judge directed the jury that there was no evidence to support the plea, and that the fact of the wife buying the goods at a low price did not affect the question of damages; the defendant would be liable for the value of the goods.

Held, that the direction was good.

Application to add a plea of leave and license was made after evidence that the female plaintiff had bid at the sale was given, and on the ground that this supported the plea. The defendant in his evidence claimed to sell adversely to the plaintiffs under an execution against the husband. Subsequently the defendant's counsel, without stating by whom he would prove it, offered evidence to shew the plaintiff's assent to the sale, which was refused.

Held, rightly so.

This was an action of trespass tried before Mr. Justice Weldon, at the Queen's Circuit, July, 1880. The defendant, under an execution against the husband, seized and sold certain property claimed by the wife, whereupon this action was brought. The plaintiffs had a verdict for \$300.00. The pleadings and material facts are fully stated in the opinion of Mr. Justice Weldon.

June 21 and 22, 1881, *Earle* for the defendant, moved for a new trial on these grounds, among others:—1st. Improper rejection of evidence offered to support the plea of leave and license; 2nd. Misdirection in telling the jury that the fact of the female plaintiff attending at the sale and bidding in the presence of her husband, did not affect the case, and there was no evidence to support the plea of leave and license; 3rd. Misdirection in telling the jury that the plaintiff buying in the goods at a low price did not affect the question of damages.

E. L. Wetmore, contra. It was decided in *Rankin v. Mitchell*,¹ that where property is unlawfully seized, the measure of damages is the full value of the goods: *West v. Rutledge*² and *Coates v. Gosline*.³ The plaintiff having forbidden the sale had a right to bid: *Noble Temple*.⁴

Earle, in reply.

Cur. adv. vult.

¹ 11 Han. 499.

² 1 P. & B. 674.

³ 4 P. & B. 323.

⁴ 1 Han. 274.

WELDON, J., now said: This was an action of trespass tried before me at the last Queen's Circuit.

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The declaration contained three counts:—

1. The wrongfully taking and depriving Elizabeth D. Scott, wife of Joseph H. W. Scott, of the use and possession of her goods, consisting of dry goods and groceries.

2. Broke and entered a certain store and took the goods of the said Elizabeth D. Scott.

3. Broke and entered a store and locked it against the said Elizabeth D. Scott.

The defendant pleaded: 1st, not guilty; 2nd, that the property was not the property of Elizabeth D. Scott and 3rd, as to said first count: That Richard C. Walkam recovered a judgment against Joseph H. W. Scott in the County Court of Queens for \$110 damages and \$23.80 costs, upon which a writ of *fiery facias* was issued to the sheriff of Queens, and he, the defendant, as sheriff of Queens, seized and sold the said goods and chattels as the property of Joseph H. W. Scott.

As to the second and third counts, several pleas were pleaded and that he quietly and peaceably entered the said shop and took the goods of the said Joseph H. W. Scott, and the shop was not the shop of the said Elizabeth D. Scott, but the shop of the said Joseph H. W. Scott—Replications taking issue thereon.

It appeared in evidence on the part of the plaintiff, that the said Elizabeth D. Scott, the wife of Joseph H. W. Scott, was the daughter of the late Daniel Smith, of Gagetown, in Queen's County, and inherited real and personal estate from her father, which she rented for \$150 a year; that she rented a small store in Gagetown, and had in 1877, commenced trading in partnership with her brother-in-law, and that in April 1878, she bought him out, and did business on her own account. In the summer of 1878 she bought goods from various persons, paid part, and was still indebted to them for the balance. In the autumn of that year the defendant, as sheriff of Queen's, under a writ of execution against Joseph H. W. Scott, entered the store and took possession of the goods therein, and sold the same to the extent of \$163 to satisfy the execution and the sheriff's fees. On the first day of the sale Mrs. Scott bid for a box of soap, no person

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bid against her, and she bought for less than the selling price. The defendant then postponed the sale, and a fortnight after sold enough to satisfy the execution. The property sold was, at the selling price, worth \$600, but the articles sold, cost the plaintiff, Elizabeth Scott \$399. She bought a few things; the defendant knocked them down to her. It was proved by Mrs. Scott that the goods so sold by the defendant, were bought solely on her own credit from her means derived from the rents of her property; that she was indebted to Logan, Lindsay & Co. to the extent of \$208 for the groceries sold to her, in which she was corroborated by Lindsay, and she was still liable and Logan, Lindsay & Co., held her solely liable therefor. At the close of the plaintiff's case, the defendant's counsel asked leave to add a plea of leave and license which was allowed, he contending that the bidding by Mrs. Scott was evidence to sustain the same.

The defendant's counsel then entered into his defence, and called the defendant, who stated he as sheriff of Queen's had seized and sold under and by virtue of the execution, and he had levied upon the property in the store, that Mrs. Scott had told him she claimed the property and people were unwilling to bid against her, and he the defendant readily knocked the goods down to her, and she paid him therefor. Besides the soap she had bought \$5 worth.

The defendant's counsel contended that the plaintiff, Mrs. Scott, having bought the articles at a reduced price, would limit the damages the plaintiff sought to recover.

I told the counsel I should direct the jury that the purchase by the plaintiff, Mrs. Scott, had nothing to do with the damages; the defendant would be liable for the value of goods, not what they brought. The counsel for the defendant offers this evidence to prove the assent or dissent of the plaintiff—"When Mrs. Scott bid, I said persons were unwilling to advance on the goods, and I readily knocked them down to her." I stated, "I refuse on the ground that the sheriff claimed to sell adversely to the plaintiff to satisfy the execution."

The defendant's counsel then said "I offer evidence to shew the assent of the plaintiff to the sale." The defendant should have stated what other grounds he had to shew the assent as

set forth in rule 72 Stev. Dig., Hil. T. 30 Vic. 1867. I said, "I refuse it as the sheriff states he was selling under an execution."

The defendant did not state by whom he was going to prove the assent of the plaintiff to the sale. He had, at the close of the plaintiff's case, moved to have the plea of leave and license added on the ground that the plaintiff, Elizabeth Scott, having bid at the sale was leave and license. The defendant having declared he sold under the execution was sufficient ground for refusing as I did. The sheriff was selling by virtue of the execution he had in his hands; the levy he made was under and by virtue of the writ of *fi. fa.* against Joseph Scott, and the shop which contained the goods was taken possession of by him, by virtue of the execution. The bidding upon the articles by Mrs. Scott could not amount in law to proof of the plea of leave and license, and the defendant in his evidence did not put it on any such ground, nor did he admit he sold the property otherwise than by virtue of the execution, and after exhausting all the knowledge which the defendant had as to the authority for taking the property, and in his own defence to the action, it would be inconsistent with the evidence he had already given that the goods had been taken under an execution against Joseph H. W. Scott on a judgment against him. The sheriff, the defendant, had detailed the conversation he had with Joseph Scott. There was nothing that passed between them to shew any assent on the part of the plaintiff in the execution, and even if he had expressly given his assent to the sale of the goods not belonging to him, but belonging to his wife, procured by her from her own means and credit, and for which Joseph Scott was not liable, it could not have availed the defendant. The plaintiff, Mrs. Scott, had stated in her evidence "that she had heard the sheriff had an execution against her husband, and he intended closing the store. She saw the sheriff, and told him what she had heard, and that he must not do so, as it was hers." The defendant admits she told him so, "but he was directed by the attorney to proceed and he thought it better to obey orders."

After all this evidence was in, and counsel stating he offered evidence as to the "assent or dissent to the sale by the plaintiff" he did not say by whom he was going to prove the leave or

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license. He called the deputy sheriff, who had been so for eleven years, and he proved he had bought things higher, and that they were sold in the usual way.

I stated to the jury the defendant had not answered the plaintiff's case. I read the law from the Consol. Statutes, cap. 72, which declares—

“The real and personal property belonging to a woman before, or accruing after marriage, except such as may be received from her husband while married, shall vest in her, and be owned by her as her separate property, and it shall be exempt from seizure or responsibility in any way for the debts or liabilities of her husband, and shall not be conveyed, encumbered, or disposed of, during the time she lives with her husband, without her consent.

*Dow and wife v. Dibblee*¹ is a conclusive authority for this action, as to the right of Mrs. Scott to the property so seized by the defendant. The defendant had sold out the plaintiff, Scott, the year before, 1877, and these goods were those bought by the wife on her own credit and responsibility; the parties selling to her, looked to her for payment; her bidding and being present at the sale, and obtaining some of the goods at a low price or the defendant's knocking off some of the articles at a low figure could not be leave or license; nor ought these facts to be taken into consideration in the damages. The case of *Wood v. The Carleton Branch Railway Co.*,² is an authority if any were wanting, that the presence of Mrs. Scott at the sale and bidding, and obtaining the goods, because persons were unwilling to bid against her, was not such a consent to the sale as to affect her remedy at law, and she never gave any consent in any other way. The plea of leave and license was wholly inconsistent with the defendant's evidence, who declared he sold under the execution. How could the counsel give evidence to contradict the positive statement of his own witness, the defendant, who would know under what authority he seized and sold the goods.

I directed the jury that there was no justification proved under the pleadings and if the property so taken and sold was Mrs. Scott's, the defendant was liable for taking property not belonging to the execution debtor. The damages were for their consideration. The sheriff sold for \$163 what Mrs. Scott stated

¹ 11 Han. 55.

² 1 Puga. 244.

cost \$400. I thought between those two amounts the jury could find the damages. I also told the jury they could allow interest in the nature of damages. The jury found \$300. I am of opinion if any one has a right to complain it is the plaintiff, Mrs. Scott.

I am therefore of opinion there are no grounds for disturbing the verdict, and the rule for a new trial should be refused.

WETMORE, DUFF, PALMER, and KING, JJ., concurred. ALLEN, C. J., not having heard the argument took no part.

Rule refused.

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STADACONA INSURANCE COMPANY v. RAINSFORD.

Evidence—Certificate under 37th Vic. c. 94, Acts of Parliament—Necessity of shewing defendant to be a shareholder before certificate is evidence against him.

1881.

November.

By the fifth section of the Act¹ incorporating the STADACONA FIRE and LIFE INSURANCE COMPANY, it is provided that in an action against a shareholder for calls, a certificate under the seal of the company, and purporting to be signed by one of their officers, to the effect that the defendant is a shareholder, that such calls have been made, and that so much is due by him, shall be received in all courts of law as *prima facie* evidence to that effect. The certificate put in evidence on the trial certified that defendant was the holder of fifty shares, that certain calls had been made, and that he was indebted to the company in a sum named, being the amount of the calls.

Held, that the certificate was not evidence against the defendant, in the absence of other evidence that the defendant was a shareholder in the company.

This was an action for calls brought by the plaintiff company against the defendant, under the Act incorporating the company; Acts of Parliament 37 Vic., c. 94. It was tried before Mr. Justice Duff, at the St. John Circuit. The certificate offered in evidence under the 5th section of the Act, stated that defendant was the holder of fifty shares subscribed by him, that a third, fourth, fifth, sixth and seventh call had been made according to law and had become payable on certain days, naming them, that he was indebted to the company for the amount of \$1250, for the amount of the calls, with interest, etc. The evidence was received, and a verdict found for the plaintiff company by consent, leave being reserved for defendant to move to have a nonsuit entered.

June 23rd, 1881. *Weldon, Q. C.*, moved accordingly, and *Tuck, Q. C.*, was heard contra, for the plaintiff company. The validity of the calls and the power of Parliament to make the

¹ Acts of Parliament of Canada, 37 Vic., c. 94.

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certificate evidence, that, as it was contended, being a matter of procedure, were discussed at length by the counsel, and a number of authorities bearing on the question cited. But as the judgment turned upon another objection, namely, that outside of the certificate there was no evidence that defendant was a shareholder, it is unnecessary to refer further to the argument or the authorities.

Cur. adv. vult.

WELDON, J., now said: This was an action brought by the plaintiffs against the defendant for calls. The defendant pleaded he was not a stockholder, and non-liability for the calls. The action was tried before Mr. Justice Duff, at the Saint John Circuit in 1880. A verdict was taken by consent with leave to enter a nonsuit, if the evidence was insufficient to make out a case against the defendant.

The plaintiffs were a company incorporated under the Dominion Statute, 37 Vict., cap. 94. The second section directs how the shares shall become vested by persons subscribing for the same, subject to the provisions of the Act.

The third section directs that subscribers shall pay five per cent. in three months thereafter and the remainder not exceeding five per cent. per call at periods of not less than three months interval; with a proviso that no instalment shall be called for, nor be payable in less than thirty days after public notice shall be given in two newspapers published in the city of Quebec (one in the English language, and one in the French language) and in the Canada Gazette.

The fourth section provides if calls are not paid when they become due, they are to bear interest, and the directors may forfeit the shares, and sell the same for the calls, returning the surplus, if any, to owner of the shares.

The fifth section is by way of a proviso to the sections which precede it, and directs the enforcement of payments of calls, what need only to be averred or proved, and a certificate under the seal of the company shall be received as *prima facie* evidence.

These sections must all be read together, and the first preliminary proof is in the third section;—how a person shall become entitled to be a shareholder by subscribing for so many shares, and a payment of five per cent. at the time of subscrip-

tion. This being done he becomes a stockholder, and subject to the provisions of the Act, and the certificate under the seal of the company is binding upon him. But to make it binding on one who has never become a shareholder in the company is at variance with all rules of evidence, and altogether different from those which are exercised at common law, and therefore requires clear language to make them applicable to a party who is not shewn to be a stockholder in the company.

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The true construction of the several sections 2, 3, 4, and 5 must be formed by reading them together. Persons who become holders of stock in the said company, would understand what they are governed by, and how they would become liable to the payment of calls.

I therefore arrive at the opinion, that it must be shewn that the defendant, has subscribed for stock, or in some way become a stockholder in the company, and there appears to be no evidence given to shew the defendant had ever subscribed for stock or in any way become a member of the corporation. How then can a certificate under the seal of the company apply to him?

In *Northard v. Pepper*,¹ Erle, C. J., said—

“An enactment altering the law of evidence and creating statutory evidence whereby the right of parties may be effected, must be construed strictly.”

The certificate purporting to be signed on 12th August 1880, could not affect the defendant, unless he was shewn to be a stockholder. In the absence of such evidence how could the certificate avail to make the defendant liable as a stockholder. In the absence of any evidence shewing the defendant was a subscriber for stock, or in any other way a stockholder, how can the defendant be made liable? And how can the certificate be *prima facie* evidence against a person who is a stranger to the company? On this ground alone there is no case made out for a jury. The rule must be made absolute for a nonsuit.

DUFF, PALMER, and KING, JJ., concurred in the opinion of Mr. Justice Weldon.

ALLEN, C. J., not having heard the argument, and WETMORE, J., being related to the defendant, took no part.

Rule absolute to enter nonsuit.

GENERAL RULES.—MICHAELMAS TERM, 45TH VICT.

Admission of Barristers.

1. Whenever any attorney of this Court shall desire to be called to the Bar as a barrister, he shall apply by petition to the Court, stating the date of his admission as an attorney; which petition shall be filed with the clerk on or before the first day of the term in which he intends to apply.

2. Thursday in the first week and Thursday in the third week of each term, at the opening of the Court on such days, shall be the times for the admission of barristers, and no attorney shall be admitted to the Bar at any other time unless it shall be shown by affidavit to the satisfaction of the Court that the person so applying was prevented by reasonable cause from being present at the time appointed.

(Signed)

JOHN C. ALLEN,
J. W. WELDON,
A. R. WETMORE,
CHARLES DUFF,
A. L. PALMER,
G. E. KING.

KINNEAR, APPELLANT, v. BLACK, RESPONDENT.

1881.

October.

The following reasons of Mr. Justice Wetmore for his judgment in the above case were accidentally omitted from the Report of the case, *ante* page 272.

WETMORE, J. This cause was tried in the Westmorland County Court, and resulted in verdict for the plaintiff, Black. The defendant, Kinnear, appealed the case, under sec. 51, Con. Stat. cap. 51, giving the necessary bond. The proceedings were certified to the court, but the cause was not entered by the appellant on the appeal paper.

The respondent applied to the court to have the appeal dismissed with costs under rule 2 of Mich., 40 Vic., on the ground of the cause not having been entered as required by rule 7 of same term. The counsel moving informed the court that the appellant's counsel had given him notice that the appellant did not intend proceeding with the appeal. Rule No. 1 requires the appealing party to enter the cause at the term immediately succeeding the receipt by the Clerk of the Pleas of the proceedings from the County Court Judge. The appellant failed to comply with this rule, and therefore this motion. Rule No. 2, among other matters states, in case the appellant shall neglect to enter the appeal on the paper according to rule No. 1, the respondent may upon the next or any subsequent common motion day after default, move that the appeal be dismissed with costs.

The papers were duly certified, and the appellant failed to comply with rule No. 7; therefore by the express terms of the rule the respondent was absolutely entitled as a matter of right to have the appeal dismissed with costs, unless something interfered to prevent. Now, what is there to prevent? The appellant's attorney gives notice he does not intend proceeding with the appeal: this, in my opinion, should have no more effect than a piece of waste paper. If the attorney wished the appellate proceedings discontinued he might possibly apply to a Judge of the Supreme Court for a summons requiring the opposite party to shew cause why such proceedings should not be discontinued on payment of the respondent's costs, and on hearing, the Judge could make such order as his discretion dictated,

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and thus the appeal proceedings might be terminated. Whether such course was available or not, it seems to me impossible that the appellant's attorney by his own mere motion signified by a notice, can stop the proceedings. If he can, what about the respondent's rights under the bond given by the appellant, conditioned for the payment of all the costs of the appeal awarded by the Supreme Court; surely the protection afforded by this bond cannot be swept away by a notice from the attorney of the appellant. It is also said that under sec. 52 of cap. 51 the respondent has his remedy, and he has that remedy. The enactment is as follows :

"Provided that, if after the Judge has certified a copy of the proceedings to the Supreme Court, the appellant does not prosecute his appeal according to the practice of the Court of Appeal, the successful party may apply to the Judge for leave to proceed on the judgment, and leave for that purpose may be granted accordingly *if the Judge thinks fit*, and the successful party shall also be entitled to such costs as he shall have incurred in consequence of the appellant's proceedings, which costs shall be taxed by the clerk, and added to the judgment."

Though the respondent has this remedy, he has also the remedy given by the rule of this court, in consequence of its provisions not having been complied with—which he has a right to enforce. His having another remedy, under the second section quoted above, is no answer to his application. If he has two remedies, can he not exercise his option as to the one he will avail himself of? Had he sought his remedy for costs incurred by the appeal, under the 52nd section of the Act, it seems to me he might have been as well told by the Judge in the Court below, that he had his remedy in the Supreme Court, and to go there for it, as to be told in this Court that he has his remedy in the Court below, and to go there for it; being thus driven from pillar to post, handed from one court to another, seeking a right that in my humble opinion, the first court he applied to was legally bound to give him. But the appellant is in a very different and in a much better position in applying to this Court, as here he has the security of the bond for his costs in consequence of the appeal, and in the Court below he has not the security of the bond for such costs. This may be the reason why he preferred applying to this Court. Besides, under sec. 52 leave may be granted for the

party to proceed on his judgment *if the County Court Judge think fit*, but under the rule there is no *think fit* about it, the proceeding is a matter of right. I cannot see why the respondent should be denied what appears to be a clear legal right; the appellant has incurred a liability by not complying with the positive rules of this Court, and the respondent is entitled to the advantage given by such rules. The notice from the appellant's attorney amounts to nothing, and I think the application should be granted; unless the solemnly declared rules of this Court are to govern the practice, I see no use in making them. The making and publishing of rules unless they are to be acted upon, is only calculated to mislead, and I fear to withdraw from them that respect which they should command.

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EX PARTE McCLEAVE.*

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Canada Temperance Act 1878—City within meaning of—Licenses—Expiration of.

June.

The Town of Moncton, in the County of Westmorland, was incorporated by Act of Assembly, whereby the whole local government of the town, and the exclusive power to grant licenses for, and to regulate the sale of spirituous liquors in the town, was vested in the Town Council. The County of Westmorland was afterwards incorporated as a Municipality. "The Canada Temperance Act, 1878," provided that the proceedings for bringing the Act into force in any county or city should be by petition to the Governor General of at least one-fourth of the electors of any county or city, on which a proclamation might issue for taking a poll of the votes for and against the petition. By section 96, if the petition was adopted by the electors of the county or city named therein, and to which the same related, the Governor General in Council might by order in Council declare "That the Act shall be in force and take effect in such county or city, from and after the day on which the annual or semi-annual licenses for the sale of spirituous liquors then in force in such county or city will expire." A petition from the requisite number of electors in the County of Westmorland having been presented to the Governor General, and a vote having been taken adopting the petition, an order in Council was made, declaring that the Act should be in force and take effect in the County of Westmorland from and after the day on which the annual or semi-annual licenses for the sale of liquors then in force in the said county expired. At the time this order in Council issued, there were licenses for the sale of liquors in force in Moncton, granted by the Town Council, and in the County of Westmorland, granted by the Municipality, such licenses expiring at different periods.

Held, by ALLEN, C. J., and DUFF, J. (KING, J., dissenting), that Moncton is a city within the meaning of the Canada Temperance Act, and as no separate vote of the ratepayers of the town had been taken, the order in Council bringing the Act in force in the County did not apply to Moncton. *Held* per KING, J., that Moncton is not a city within the meaning of the Act and that the Act came in force in the County, including Moncton, on the termination of the latest expiring licenses either in the town or county.

* Note.—This case was unavoidably omitted from the cases reported in Trinity Term.—REV.

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The licenses granted by the Town Council of Moncton expired on the 15th December, 1880. A bye-law of the Municipality declared that all tavern licenses should expire at the annual meeting of the council, which was the third Tuesday in January. Licenses were granted by the Municipality on the 24th January, 1880, for one year.

Held, per WELDON and WETMORE, JJ., that even if the Act were in force in Moncton, such licenses would not expire till the 24th January, 1881, and that the Canada Temperance Act would not be in force in Moncton till that day. Per KING, J., that the licenses should be read in connection with the bye-law, and that they would not run for 365 days from their issue, but would expire at the annual meeting of the Municipality (the 18th January, 1881), and therefore a conviction for selling liquor in Moncton on the 23rd January was sustainable.

This case was referred to the Court by His Honor Mr. Justice King, to obtain their opinion on a question arising on an application made to him at chambers under Consol. Stat., c. 41, to discharge Duncan McCleave from custody. McCleave was convicted under "The Canada Temperance Act 1878" for an illegal sale of liquors in the town of Moncton, on the 23rd day of January last, and was imprisoned for the non-payment of the fine and costs imposed.

Proceedings were had for bringing the Act in force in the County of Westmorland, and an order in Council was made on the 10th of May, 1880, by which the second part of the Act was declared to be in force in the County of Westmorland from and after the day on which the annual or semi-annual licenses for the said county expired.

The town of Moncton was incorporated by the Act 33 Vic., c. 40, whereby the power of regulating the sale of spirituous liquors, the granting of licenses and the management of the general fiscal and municipal affairs of the town was vested in the town council. The licenses in force in Moncton at the time of the order in Council, expired on the 15th of December, 1880. On the 24th January, 1880, the Municipal council of the county made an order that licenses should be granted for a year. At the time this order was made there existed a bye-law of the Municipality which provided that all licenses granted by the council should expire at the regular annual meeting of the council on the third Tuesday in January, which would be the 18th of January of the present year. The council adjourned before the 23rd of January.

April 13th, 1881. *Wells* was heard in support of the motion. The conviction was for a sale on the 23rd of January. The Act if in force at all in Westmorland, was not in force then, for

the county licenses were granted on the 24th of January for a year. The bye-law of the council which declared that all licenses should expire at the annual meeting of the council in January is *ultra vires*.

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Moncton is a city within the meaning of the Act, and is entitled to a separate vote.—Canada Temperance Act, 1878, sect. 2. The framers of the Act had the municipal regulations of Ontario in view. There all the licenses expire on the same day, and the cities have the right to deal with licenses independently of the counties.—2 Rev. Stat. Ont. pages 1882–1892.

The Act never came into force in Westmorland, under the order in Council of the 10th May, because there was no day on which all the licenses in the county expired. It was contemplated that the Act should go into force on a particular day in the whole county; but it could not do so, for the town and county licenses expired on different days. The conviction was also bad for imposing costs in addition to the fine.

Atkinson, contra. The Act came into operation in Moncton on the 15th Dec., 1880, and in the county on the 24th of January, following. [KING, J. If it is all one territory for the purpose of bringing the Act into force, can it be in force in one part of the county and not in another?] I can see no reason why it should not. [ALLEN, C. J. I do not think such a state of affairs was contemplated: see Sec. 96.] If possible the court must give effect to the Act.

The year for which the licenses were granted was a license year; that is, from the granting until the next regular annual meeting of the council, which may be more or less than three hundred and sixty-five days. Potter's Dwar. p. 278. The bye-law is not inconsistent with the Municipality Act, and is not *ultra vires*. Consol. Stat., c. 99, s. 96; c. 105, ss. 2 & 7.

The proceeding for penalties for an offence against the Act is under the Sum. Conv. Act, which authorizes the magistrate convicting to impose costs in addition to a penalty. [DUFF, J. If the penalty was right, I have no doubt about the costs. ALLEN, C. J. The right to impose costs in such cases is settled.]

Barker, Q. C., on the same side. The court should if possible give effect to the Act. It must be construed as a remedial Act. Dom. Stat., cap. 1, sec. 7, sub-sec. 39. For the purposes of the

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Act the whole Province is divided into cities and counties, and whatever is not a city is a part of the county for the purposes of the Act. The authority which incorporated Moncton elected to declare it a town, and the Canada Temperance Act makes the town a part of the county for the purposes of the Act. There is a distinction in this country between incorporated towns and cities, though it may be that the circumstances by which it is usual to distinguish them in England have no existence in this country. Consol. Stat., c. 99, s. 4; c. 65, s. 96, and c. 100, s. 1, recognize a distinction between incorporated towns and cities. As to the meaning of the word town, *Reg. v. Cottle*,¹ *South Western Railway v. Blackmore*,² *Collier v. Worth*,³ *Commissioners of Milton v. Feversham District Highway Board*,⁴ *Elliott v. South Devon Railway Co.*,⁵ 1 Black. Com. 114. The word town may have different meanings in different Acts.

Tuck, Q. C. in reply. The reason for giving cities separate elections under the Act is that they have municipal rights and privileges quite independent of the municipal rights of the counties. One would be the right to raise a revenue for city purposes by fees derived from licenses granted for the sale of spirituous liquors. It was no doubt considered unjust to deprive the inhabitants of this right unless a majority of them desired it. The only mode of determining whether the particular body who possess the right are willing to resign it is by a separate vote of that body. It does not follow that because a majority of the voters of the county favored the Act that a majority of the voters of the town of Moncton did. The law professes to be a local option law, and its intention was to give every division in a county which had the right distinct from the municipality of the county of granting licenses, an opportunity of saying whether or not they would resign that right. Moncton has all the rights and privileges usually incident to a city, and is a city within the meaning of the Canada Temperance Act. Universal Dict'y; Zell's Encyclopædia; *Reg. v. Hurshman*,⁶ *Rex v. Hall*,⁷ Maxwell's Stat. 247; Canada Temperance Act, sec. 2.

Cur. adv. vult.

¹ 16 Q. B. 412.
² L. R. 4 H. Lords 310.
³ 1 Ex. Div. 464.
⁴ 10 B. & S. 548.

⁵ 2 Ex. 725.
⁶ 1 Puga. 317.
⁷ 1 B. & C. 123.

The Court now delivered the following judgments :

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KING, J. The applicant was convicted under the Canada Temperance Act for an illegal sale of liquors in the town of Moncton on the 23rd day of January ; and the Act being in force (if at all) in the town of Moncton, by virtue of an election under the 1st part of the Act held in the County of Westmorland, the first and the main question argued before us is, whether the town of Moncton is a city within the meaning of the term as used in the first part of the Act, so as to entitle it to a separate vote respecting the adoption of the Act.

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The Act provides for such adoption in counties and cities by a separate vote being taken in the counties and cities respectively, and it declares that when adopted in any county or city it shall come into force in the county or city, from the day on which the annual or semi-annual licenses then in force in the county or city will expire, or in one year thereafter, according to certain special provisions of the Act.

By the second section it is declared that the word county shall include every town, township, parish, and other division or municipality (except a city), within the territorial limits of the county, and also a union of counties, where united for municipal purposes.

The town of Moncton is a part of the parish of Moncton, in the county of Westmorland, and is incorporated as the town of Moncton by Act of Assembly 38 Vic., c. 40.

With slight and immaterial differences the municipal privileges possessed by the town of Moncton, and by the other provincial towns, the town of Portland, the town of Woodstock, etc., are substantially of the same kind and extent as those possessed by the cities of St. John and Fredericton, and include in each case the power of granting licenses for the sale of spirituous liquors, and the sole right to the revenues derivable therefrom.

It is contended for the applicant that inasmuch as the distinguishing mark of a city as given in the definitions of a city by Coke, Blackstone, and other writers, viz.: "a town corporate, which is or hath been the see of a bishop," is entirely inapplicable as a ground of distinction in this country, there is therefore no distinction here between cities and towns corporate in gene-

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ral; but that every town incorporated for general municipal purposes is substantially a city; and that as this Act has reference to a single incident of municipal control, viz., the authority to grant liquor licenses, every town corporate that has this authority is a city within the meaning of the Act. It is argued that this accords with the scheme of the Act, which, it is alleged, is to give to the electors within a certain territory, the option of deciding as to the continuance of the exercise of the licensing authority to which the territory is subject under the provincial or local regulations; and that the clause providing for the coming into force of the second part of the Act in any county or city adopting it "from the day on which the annual or semi-annual licenses for the sale of spirituous liquors then in force in such county or city will expire," is inapplicable to the case of a territory embracing two or more licensing communities having separate licensing authorities and exercising them separately, with the almost certain consequence of the licenses being terminable at different times, as is the case here, where the licenses granted by the town of Moncton expired in December, and the licenses granted by the municipality of the county of Westmorland expired in the following January.

It is also argued that the separate vote must have been conceded for some reason applicable to the character of the separate community, and that one such reason may be found in the wish to respect the municipal privileges and the right of self-government conceded to towns corporate possessing by law the power to deal with liquor licenses, and to leave to such self-governed communities the right to determine whether or not they will surrender any portion of their corporate powers and the revenues and advantages derivable from their exercise, and that it is not reasonable to suppose that parliament has placed in the electors of Westmorland the power of determining whether or not the citizens of Moncton shall surrender corporate privileges and revenues on which they had been accustomed to depend for municipal purposes, and which, if left to themselves, they might or might not surrender.

It seems to me however that the question is a simple one of construction. Now in the first place I would observe that the Act attaches no special meaning in terms to the word city,

as is oftentimes done in modern Acts where words are used in any special sense, and as is done in this Act in respect of the word "county."

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Then the word "city" is used in the Act in a connection which, to my mind, clearly shows that it has no special meaning at all in the Act either express or implied, for it is used in connection with the words "towns," "townships," "parishes," "municipalities," "union of counties," all of which words are words of recognized and ordinary import. Now these words "towns," "townships," "parishes," "municipalities," and "union of counties" denote the ordinary municipal or civil divisions into which the territory of the country is divided for municipal purposes by the proper legislative authority, that is to say, by the Provincial Legislatures. And so it seems to me clear that the word city, when so used, and in the absence of any constructive use put upon the term by the Act must be taken as denoting a certain municipal or civil division of the country. And as municipal institutions are within the legislative authority of the provincial legislatures, the word city, as used in the Act, must be taken to denote that which the provincial legislatures have seen fit to denominate by that name; or at least to denote that which it denotes as a term of municipal or civil division in the respective provinces.

Now, what is such meaning of the word "city?" I admit that if the distinction between a city and a town corporate is simply that which is indicated in the description of Coke and Blackstone and in the law dictionaries, viz.: that a city is "a town corporate, which is or hath been the see of a bishop," then it might well be that in this country, where such distinguishing incident is immaterial, the terms might be regarded as fairly interchangeable. But the above definition is not exhaustive, and probably was never intended to be so.

In England the Crown has at common law the power to create municipal corporations and to declare by what name the corporation shall be incorporated. It has also the prerogative of declaring any town to be a city. *Rutter v. Chapman*; ¹ Grant on Corporations 52 & 351. So the Crown, out of its special grace and favor and by virtue of its control over the municipal division

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of the country, granted to certain cities and towns in England, the privilege to be counties of themselves. Such are the cities of London, York, Bristol, Coventry, Canterbury, Exeter, Gloucester, Litchfield, Lincoln, Norwich, Worcester, and York. Such also are the towns of Kingston upon Hull, Nottingham, Newcastle on Tyne, Pool and Southampton. Blackstone, p. 118. This power to constitute any place a town corporate or a city, and to constitute any town or city a county of itself by Royal Charter, was part of the right inherent in the Crown to establish the civil divisions of the country. And the name of a corporation being an essential part of it, the character of the corporation would be largely determined by the name by which it pleased the Crown that it should be known. The title and distinction of a city seem to have been bestowed on corporate places in England in earlier times chiefly in view of their ecclesiastical importance, and in this way the ecclesiastical distinction and the civil distinction were generally united. But in all cases the city became a city, not because of its position in the administration of ecclesiastical affairs, but by virtue of its being declared to be such by Royal Charter. And there are cases where towns have been made the see of a bishopric without being made cities, as in the case of Ripon and also Manchester, which latter place was not, at least up to recent years, a city, though each was made a see: Grant on Corporations, p. 52. So with Liverpool, which has in recent years been made a see, but is in law still the town and borough of Liverpool.

At page 114 of Mr. Christian's edition of Blackstone, (1809), there is the following note:

"Westminster was one of the new bishopricks created by Henry VIII. out of the revenues of the dissolved monasteries. Thomas Thirlby was the only bishop that ever filled that see. He surrendered the bishoprick to Edward VI. (1550), and on the same day it was dissolved and added again to the bishoprick of London. Queen Mary afterwards filled the church with Benedictine Monks; and Elizabeth by authority of parliament, turned it into a collegiate church subject to a dean, but it retained the name of a city, not perhaps because it had been a bishop's see, but because in the letters patent erecting it into a bishoprick King Henry declared: '*Volumus itaque et presentes ordinamus quod ecclesia cathedralis et sedes episcopalis, ac quod tota villa nostra Westmonasterii sit civitas ipsamque civitatem Westmonasterii vocari et nominari volumus et decernimus.*'

There was a similar clause in favor of the other five new created cities in Chester, Peterboro', Oxford, Gloucester, and Bristol."

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Nor does the distinction between a city and a town at all depend upon the extent of its municipal powers or privileges. In England by the Municipal Incorporation Act of 1835, 5 & 6 Wm. IV. c. 76, a common form of municipal government was provided for all the cities and boroughs to which the Act extended, being with but few exceptions all the cities and towns corporate in England, and so much of the charters of such cities and boroughs as was inconsistent with the Act was repealed; but notwithstanding that the cities and towns corporate were thereby so closely assimilated, the distinction between them was preserved so far at least as respects their distinctive name and style. *Att'y Gen. v. Mayor of Worcester*; ¹ *Corporation of Rochester v. Lee*.²

It seems to me therefore that the real, and the only, but the sufficient distinction between a city and a town corporate (not being a city) is a titular one.

That is a city which the competent authority has seen fit to establish as a city, and that is a town which the competent authority has chosen to call a town; and into the reasons which lead it to use one or other of these titles or names it is not material to enter.

In this case the competent authority, that is to say the Legislature of New Brunswick, having seen fit to incorporate certain districts in the parish of Moncton and the inhabitants thereof as a town corporate under the name of the town of Moncton, I am of opinion that the town of Moncton is technically and really as well as in the popular sense a town and not a city.

I admit that on such a construction of the word the Act must interfere with the municipal franchises and authorities of the towns in this Province; but the whole Act is, upon any view of it, an interference to some extent with the municipal institutions of the Province.

Then as to the provisions of the Act relating to the time when the Act shall be declared to be in force and the difficulty of applying these provisions to a case like this, where the licenses in Moncton and in the rest of the county expired at different times—there seems to be some difficulty, and appar-

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ently the Act in some respects seems to have been drawn too exclusively in view of the operation of the Ontario municipal system; but I do not think the difficulty insuperable, and being clearly of opinion for the reasons before given that Moncton is not entitled to a separate vote, it becomes necessary to endeavor if possible to interpret the Act in a way which will give effect to its provisions, rather than defeat it; and it seems to me that the words, "And when adopted in the county or city the Act is to be in force and take effect in such county or city upon, from, and after, the day on which the annual or semi-annual licenses for the sale of spirituous liquors then in force in such county or city will expire," may be read as though the words "all the the annual or semi-annual licenses" were used, instead of the words "the annual or semi-annual licenses."

In this view the Act would be in force in the county of Westmorland, including the town of Moncton, on the expiry of the latest expiring annual or semi-annual licenses either in town or county.

There were two other points argued. I do not think there is anything in either. I think the county licenses did not run for three hundred and sixty-five days from the day on which the motion to grant the licenses was made in the county council in January, 1880; but that such motion and the licenses granted under it are to be read in connection with the bye-laws and regulations of the municipality relating to such licenses and with the Act of Assembly. And so reading them I think the licenses had expired at the date of the alleged offence.

As to the question respecting costs, I have no doubt. The procedure is to be according to the Summary Conviction Act; and the Summary Conviction Act allows costs as incidental to procedure. It is the same as if these provisions of the Summary Conviction Act had been embodied in the Canada Temperance Act.

ALLEN, C. J. Daniel McCleave was convicted under "The Canada Temperance Act of 1878," for selling spirituous liquors in the town of Moncton, on the 23rd January last, and imprisoned for non-payment of the fine imposed upon him.

An application was made under the Consol. Statutes, cap. 41, sec. 4, for his discharge; and the matter having been referred to the Court, the principal question was, whether the Act was

in force in the town of Moncton, no separate vote of the rate-payers of the town having been taken.

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The proceeding for bringing the Act into force is by a petition to the Governor General signed by one-fourth of the electors in any county or city, praying that a vote of such electors may be taken for and against the adoption of the petition. On proof of the genuineness of the signatures to the petition, and that the notices required by the Act have been given, a proclamation issues, setting forth (*inter alia*) the day on which the poll for taking the votes of the electors will be held. If more than half of the votes polled are in favor of the petition, it shall be held to have been adopted, and the returning officer shall accordingly make his return to the Governor General, who may at any time after the expiration of sixty days from the adoption of the petition, by an order in Council published in the *Canada Gazette*, "declare that the second part of the Act shall be in force and take effect in such county, or city, upon, from, and after the day on which the annual or semi-annual licenses for the sale of spirituous liquors then in force in such county or city will expire."

A petition from the requisite number of electors of the county of Westmorland was presented to the Governor General, upon which a proclamation issued, and a vote was taken adopting the petition; whereupon an order in Council was made on the 10th May, 1880, by which the second part of the Act was "declared to be in force and take effect *in the county of Westmorland* upon, from and after the day on which the annual or semi-annual licenses for the sale of spirituous liquors then in force *in the said county* expired."

The question is, whether by this proclamation and the proceedings on which it was based, the Canada Temperance Act came in force in the town of Moncton, which is situated in the county of Westmorland; or, whether a separate election should have been held for the town?

Moncton was incorporated by the Act 38 Vic. cap. 40, the third section of which declares that the administration of the fiscal, prudential and municipal affairs, and the whole local government of the town shall be vested in a town council, consisting of six councillors and a chairman, and in no other power

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or authority whatever. The 67th section enacts that all the powers vested in the General Sessions of the county of Westmorland for regulating the sale of spirituous liquors, shall be transferred to, and vested in, the town council, so far as such laws may be applicable to the town, and that no general or special Sessions for the county shall have power to grant any tavern licenses, or to make any rules or regulations respecting the same, to be in force within the town.

So far as relates to the sale of spirituous liquors, and indeed for all local purposes, the town of Moncton is entirely separate and distinct from the county of Westmorland, which is a Municipality by itself, having no control over the town of Moncton. The licenses for the sale of liquors in the county were granted by a different body, and expired at a different time, from those granted by the Town of Moncton; and in that respect, there was no more connection between them than if they had not been, geographically, parts of the same county.

It was contended, in opposing the application, that as Moncton was not a city, *eo nomine*, it was not entitled to a separate vote on the adoption of the Act, but came within the proclamation of the 10th May, and consequently the Act would be in force in the Town on the expiration of its licenses, on the 15th December, 1880, though it would not take effect in the other parts of the County until the 24th January, 1881, the day on which the County licenses expired.

The second section of the Canada Temperance Act declares that the word "county" includes "every town, township, parish and other division or municipality, except a city, within the territorial limits of the county, and also a union of counties where united for municipal purposes."

It is obvious from this section, that every town cannot be regarded as a city, and therefore the word "city" must be understood as importing something more than, or something different from a "town." But the section does not define in what this difference consists. Lexicographers have given a variety of definitions of the term "city." Dr. Johnson has given two: 1. "A large collection of houses and inhabitants. 2. [In the English law] a town corporate that hath a bishop and a cathedral church." In the Imperial Dictionary it is thus defined: 1.

"In a general sense, a large town; a large number of houses and inhabitants established in one place. 2. In the United States, a corporate town; a town or collective body of inhabitants incorporated and governed by particular officers, as a mayor and aldermen. In Great Britain, a city is said to be a town corporate that has a bishop and a cathedral church; but this is not always the fact." In Chambers' Encyclopedia it is said that though in England the term "city" is said to be confined to towns or boroughs which are, or have been, the seats of bishops' sees, yet this restriction rests on no sufficient grounds; and that the cities of the Kingdom are certain towns of principal note and importance, all of which either are or have been sees of bishops; but that there seems to be no necessary connection between a city and a see. For which 1 Steph. Com. 124, is cited. In the Encyclopedia Britannica the following definitions are given:—

"This word derived through the French *cité*, from the Latin *civitas*, is used in England with considerable laxity, as a little more than a synonyme for town, while at the same time there is a kind of traditional feeling of dignity connected with it. It was maintained by Coke and Blackstone that a city is a town incorporated, which is, or has been, the see of a bishop, and this opinion has been very generally adopted since. It does not correspond, however, with actual English usage; for Westminster, on the one hand, is called a city, although it has no corporation; and Thetford, Sherbourne and Dorchester are never so designated, although they are regularly incorporated, and were once Episcopal sees. It is true, indeed, that the actual sees in the country all have a formal right to the title, and that Westminster is the only place without a bishop, that has the same claim. In the United States, where the ecclesiastical distinction does not exist, *the application of the term depends on the kind and extent of the municipal privileges possessed by the corporations*; and charters are given raising from the rank of Town to that of City. This use of the word is much more in keeping with its derivation, which leads the mind back to the idea of the social life and corporate action of a body of freeman."

It is evident that the word "city" in The Canada Temperance Act, cannot be understood to mean merely a large collection of houses and inhabitants; and as the Act has not defined the meaning to be given to the word, we must have recourse to the purview of the Act, to discover if possible, in what sense the Legislature has used it, and whether any of the definitions which we find in the authorities referred to, will apply.

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It is a canon of construction in such cases, that the language of a statute must be construed *secundum subjectam materiam*, and that it must be understood in the sense which best harmonizes with the subject matter. Even technical terms, which are primarily to be understood in the sense in which they are employed in the science or art to which they belong, must yield to this rule of construction "as soon as the judicial mind is satisfied that another than that is more agreeable to the object and intention of the Legislature." Maxwell on Stat. 50. In *Rex v. Hall*,¹ Abbott, C. J., said: "The meaning of particular words in Acts of Parliament is to be found not so much in a strict etymological propriety of language, nor even in a popular use, as in the subject or occasion on which they are used, and the object that is intended to be attained." See also, *Colchester v. Kewney*.²

Assuming that in its strict technical and legal sense, the word "city" would import only a corporate town which had been or was a bishop's see; such a meaning is manifestly foreign to the occasion on which it is used in this Act. The Legislature was dealing exclusively with the subject of temperance, and the traffic in intoxicating liquors—with the promotion of the one and the suppression of the other. Whether Moncton is called a city in the Act of incorporation or not, is of no importance in the view which I take of the Act. But "the nature and extent of the municipal privileges" conferred upon it by its charter are of great importance.

Why, it may be asked, is a city excepted from the interpretation of the word "county" in the second section of the Act? Clearly because it possesses peculiar municipal privileges, and is governed by its own laws, distinct from the rest of the county—it has an autonomy of its own. In that respect, the rights and powers of a city, and those of an incorporated town are identical. Then, do not all the reasons which require a separate vote by the ratepayers of a city to bring the Act into operation within it, apply with equal force to an incorporated town? Is it because the chief officers of the former are called a mayor and aldermen, that it has this right; or is it because it has the right of local self-government, distinct from the rest of

¹ 1 B. & C., 128.² 1 L. R. 1 Exch. 368.

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the county in which it is territorially included, and, as such, has the right to decide whether the Act shall go into operation within its limits? The answer to this question is, I think, very clear. If then, the intention of the Legislature was that the rate-payers of a city should not be affected by a vote taken in the county under the Act, I am unable to understand why a different rule should be applied to the town of Moncton, which though not in name a city, possesses all the essential powers of one—the power to make its own laws, and regulate its own fiscal and municipal affairs, without any external control.

The intention of the Legislature is that the enforcement of the Act should depend altogether upon local option, and that such option should be exercised by the locality particularly interested. If the rate-payers of the county can by a vote procure the enforcement of the Act in the town of Moncton, and prevent the sale of liquors there, then the exclusive powers given to the town by its Act of incorporation, to grant licenses and regulate the sale of liquors within the town, are practically repealed by the votes of persons who have no connection with the town, and according to its charter, no voice in the management of its affairs, or the disposal of its revenues.

If the Act is to be brought into force by the order in Council, as well in Moncton as in the county, on which day is it to come into force? At the expiration of the licenses granted by the town, or of those granted by the county? Or, on one day in the town, and on another day in the county? I think the 96th sect. of the Act contemplates that it was to go into force on one particular day, wherever it was intended to have operation, and not on several different days. Suppose the licenses in Moncton had expired a month later than those in the county, instead of a month earlier—as was the fact—would the Act have been in force in the county on the 24th January, and not in the town till a month later, though the bringing it into force was based on the same general vote, and the same order in Council? Would the sale of liquors under such circumstances, be both legal and illegal in different parts of the county at the same time?

Construing the Act according to the rules of construction hereinbefore mentioned, and in view of the fact that the licen-

1881. *Ex parte* *McCleave.* ses in Moncton, and those in the county were granted by separate and distinct local authorities, having in this matter, no connection with each other, and that the licenses expired at different times, I think Moncton is a city within the meaning of the Act, and is not affected by the order in Council of the 10th May, declaring the Act to be in force in the county of Westmorland.

For these reasons, I think the order for discharge should be granted.

WELDON, J. By the order in Council, the Act was to be in force in the county on the expiration of the licenses. I think the licenses did not expire until the 24th of January, 1881, and that the conviction on the 23rd of that month was therefore bad, and the applicant should be discharged.

WETMORE, J. I am a good deal impressed with the position that Moncton is a city, within the meaning of the Canada Temperance Act, but I do not find myself called upon to express any opinion on the point, as I agree with my brother Weldon, that the licenses in the County had not expired at the time of the alleged offence.

DUFF, J. I concur in the judgment of the learned Chief Justice.

PALMER, J., not having heard the argument took no part.

Referred back to Mr. Justice King to carry out the judgment of the Court.

The following judgment, delivered by Mr. Justice Palmer in a matter coming before him at Chambers involving the points decided in the preceding case of *Ex parte McCleave*, is published here with His Honor's consent:—

This is an application to set aside the conviction of the defendant for selling at Sackville, in the County of Westmorland, liquor without a license under Chap. 105 Consolidated Statutes. The offence was clearly proved, but it was contended that at the time it was committed the second part of the Canada Temperance Act, 1878, was in force in the County of Westmorland, and that it repealed the 105th Chap. of Consolidated Statutes by implication.

The following facts were proved or admitted on the trial; that the petition provided by the first part of the Act was signed by more than one-fourth of the electors of Westmorland, whether the Town of

Moncton was included in the County or not; that such petition had been duly forwarded to the Governor General, and he had duly issued a proclamation for the election in the County of Westmorland; that such election was held and the returning officer took the votes of the electors of the Town of Moncton as if it were included in such County; that the votes were in favor of bringing the Act into force, and there was a majority in favor of it whether Moncton was included or not; that such returning officer made his return to that effect to the Governor General, as provided by the Act, and there was no scrutiny or objection to the election or return, whereupon the Governor General duly issued and published the proclamation provided by the Act for bringing the second part into force.

For the prosecution it was objected before me that the town of Moncton was a city, and should not have been included in the election, and therefore the election was void, and the Governor General had no right to issue the proclamation to bring the law into force, and consequently it was not in force. To this it was answered that, if that was an objection to the validity of the election, this objection should have been taken before the returning officer, or by petition to the Judge of the County Court, under the 61st section of the act; that the acts of the returning officer in deciding how to hold the election and determining its results were judicial acts and his return conclusive, and until set aside, authorized the proclamation, and the facts properly stated in it could not be controverted in a collateral proceeding.

2. That the election in the rest of the County was good without Moncton and the return correct, and if there had been a scrutiny, it could not have been set aside, even if it had been decided that Moncton was a city, and that the vote should not have been taken therein, and therefore the return good.

3. That the town of Moncton is not a city within the meaning of the Act, and therefore was properly included in the election.

I have a clear opinion on all those points, which I will express. The last point has been before the Court, and my brethren have different opinions on it, and I think that no one Judge ought to act upon his own opinion, but on that of a majority of the Court. And I would not have decided the case if that point had turned it. I would have referred it to the Court for advice, but as the other points would decide it, such a course would be of no use, as it is not likely that it would lead to any decision on that point.

As to the first point:—If the scope of the Act is looked at, the mode of proceeding in the election provided for is about identical with that for the election for Parliament. It provides for the returning officer holding his election court to accept or reject ballots and finally to return and certify the result; and the 53rd section enacts that he shall at the time and place fixed, in the presence of the agents, add together the votes—in fact determine the result—and if this is not objected to by a scrutiny before the County Court Judge, it is his duty to make the return accordingly. This has all the requisites of a judicial act, and just such acts have been decided to be judicial in

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election for Parliament, under statutes precisely similar. By the 58th section, the returning officer shall within two weeks after the summing up of the votes, if no Judge has appointed a time to try the correctness of the election (or in case of a scrutiny immediately after the decision of the Judge therein) he shall make his return certifying either his own or the Judge's decision, and when such matter has been adopted by the electors, the Governor General is authorized to issue his proclamation declaring the second part of the Act in force. It appears to me to be monstrous that after all this is done and an election held, and the proper returning officer has made his return, by which he has decided that the election has been carried on as the law directs and the result has been as he has decided, to have that questioned in any other way than as the Act points out by appeal by way of scrutiny before the County Court Judge. All the inhabitants of Westmorland under severe penalties are obliged not to violate the law and consequently to know whether or not the law is in force. They find that the proclamation is issued bringing it into force, and that an election was held and the proper returning officer made the return required by the Act authorizing the proclamation. Ought they to be obliged to inquire further, or ought that to be conclusive until set aside by some competent authority? In my opinion, all authority and reason are in favor of treating these as judicial acts and conclusive until set aside. See *Cullen v. Morris*;¹ *Tozer v. Child*.²

The question to be decided by the election is of great consequence to the whole public—whether a proper election has been held or not—and the decision arrived at is not a matter between party and party, but one affecting the rights of voters and of the whole community. The proceedings took place before the returning officer, with an appeal to the County Court Judge. Such officer is authorized to appoint agents to attend to represent persons desirous to oppose, and also persons desirous of promoting the law, at the voting and at the final summing up of the votes, and consequent determination of the question, and the law also provides a mode of carrying on a scrutiny by way of appeal. Will it not be most inconvenient and unreasonable that, after all this, and after the opportunity of doing so in the regular way was past, the same persons should be allowed in a collateral proceeding to deny the truth of the return of the returning officer? It was competent for them to raise the question, and dispute the fact before him, and they knew he must determine it, and if wrong the remedy was by appeal provided by the Act. The issues that might be raised in that proceeding are, whether Moucton did vote, and if so, whether or not it should have voted, and whether the act was agreed to be adopted by the vote. These are the issues distinctly raised and the parties might have gone into it if they chose, or they might have abstained from doing so. The decision of the returning officer was, that by the election it had been properly decided to adopt the act, and consequently he made his return accordingly, and if any appeal had been made to a County Court Judge, that

¹2 Starkie 577.²7 EL. & BL 377.

judge must have decided the matter and the return made accordingly. In either case the matter, it seems to me, becomes *res judicata*. Suppose there had been a scrutiny and an appeal to the County Court Judge in this case and the same issue raised as was attempted to be raised before the Justices in this case, the same evidence given, and the arguments of counsel the same, and the judge had decided that the election had properly decided to adopt the act, I cannot think in that case that the intention of the legislature could be that after such full enquiry and the matter fully determined by the Judge, that the same question could be brought under discussion before any tribunal that might have to administer the law brought into force under the Act. In my view the very nature of this legislation requires the contrary to make such a law respected. It is most important that all persons who are to be bound by it should know whether or not it is in force and know this with absolute certainty and to that end the legislature has devised and enacted most elaborate machinery to determine this point once for all. The return cannot be made without an appeal of any person that may be affected by it if he may wish it, and having it determined whether or not it ought to be made and after it is made machinery is provided to enable the Governor General to determine whether it is such that he ought to bring the Act into force and I think it follows that when such determination is made it is a judicial act of which the return, so long as it stands, is the incontrovertible record, and when the proclamation is issued thereon, as provided by the Act it is final and conclusive until set aside, and cannot be impeached in collateral proceedings. The law is clear that if a matter can be brought forward on a former proceeding it is not to be made the subject of a subsequent proceeding, and it is a rule of the common law that when a person has an opportunity to object to a decision of a competent tribunal, and does not do so, he is as much bound by it as if he had raised it, and it had been decided against him, and this was ruled by Mr. Mannors Sutton with reference to an election for Parliament in the Southampton case (Rogers on elections, 10th ed., 461), and if there was no authority on the subject in view of the mischievous effect of any other rule, I should be prepared to rule that if an election was held under the Act, and the returning officer allowed to make a return in due course and form without objection, such return would be conclusive, and it would not be in the power of any person to question it when the law brought into force in consequence of it was attempted to be enforced against him.

Any other would lead to conflicting and contradictory decisions and consequent confusion; this would secure uniformity and certainty in the administration of the law. The rule is that the estoppel in such cases binds all persons that had an opportunity to contest the decision just as if they had so contested it. See *Regina v. Hartington Middle Quarter*,¹ *Jewsberry v. Mummery*,² and *Church v. Abell*.³ And we decided in *Everitt v. Lynds*,⁴ that the returning officer's return on an attachment was a record, and therefore conclusive, and if so

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it would appear absurd to hold that so important a return as that of the result of an election on which a solemn act of state and the foundation of a law of the land was intended to rest and with reference to which that law had provided the most ample powers to contest it to every person to be affected by it, might, after allowing it to be made without objection and possibly after the law had been administered and obeyed for years, be disputed and tried out over and over again at any time one may choose. I for one give my voice against any such right. So far from such rule being the true rule, I think the books are full of cases to show that when acts such as these if the person *de facto* acted, and made his return, it would be valid and could not be impeached in a collateral proceeding. On this ground the case of *Brown v. O'Connell*¹ was decided.

Then as to the second point I think it is equally clear if the Town of Moncton is not a part of Westmorland County and should not have voted, the fact that it did vote and decided the same way as the rest of Westmorland cannot in any way that I can see affect the vote of the rest of Westmorland. In that case the election was complete without it, and if there had been a scrutiny and those votes rejected the return would have been the same. If the question had been whether the Act was in force in Moncton, that would have been a different question, for if Moncton is a city and as such entitled to an election, it has not had it at all. There has been no election for Moncton, only one for Westmorland, and if Moncton is not a part of the electoral district of Westmorland under the Act there has been no election for Moncton.

I am also of opinion that the defendant is right in his contention on the third point, although that opinion I give with some hesitancy in view of a different opinion which I have understood my brethren the Chief Justice and Mr. Justice Duff gave last term in the case of *Ex parte McCleave*. I have the misfortune not only to differ from the conclusions they came to, but have also been unable to see the reasons they give for their opinions, but I have been favored with the very scholarly and able judgment of Mr. Justice King who differed from them, with whose reasons and conclusions on this point, I entirely agree. At the same time I do not think the defendant is driven to the considerations mentioned in that judgment but there is ample in the Act itself to show that Moncton is not, and could not be a city intended by the Act.

Moncton is not a city according to any possible definition of a city. except that it is a town and is a corporate body having municipal franchises and rights. It is not the seat of a bishopric, and therefore is not an ecclesiastical city. It never was declared a city by royal charter nor by any Act of any Legislature, and there is no evidence that it was even commonly called a city. On the contrary, the Act incorporating it names it the "Town of Moncton," and it is designated a town both in that Act and in every Act afterwards relating to it. This was the condition of it at the passing of the Canada Temperance

Act. At that time in Canada there were, and still are, several corporations having municipal powers and franchises created by Royal charter or legislative enactment that were named by the powers that created them "cities." In this Province there were only two such—Saint John and Fredericton. I remember Halifax in Nova Scotia; Quebec and Montreal in Quebec; Toronto, Ottawa, and Hamilton in Ontario. These were places of more importance than other incorporated places called "towns," many of which were in the different Provinces. Besides these there were other places having municipal powers and franchises that were not made towns or cities. In this state of things the Act that we are called upon to construe was passed, which in its effect would in all those cases take away some franchises, rights and revenues in all of these places where it came into force, and this was not to be done without a majority vote either of those places themselves, or of the whole county in which they were situate, and it was strenuously argued before me that the Act ought not to be construed to do this without the vote of the municipality from which rights were taken away. I admit that this might be a good consideration for the Legislature not to pass such an Act, if that was the policy of the Act, but they have the power to do it in one case one way, and in others another; that this is not the policy of the Act, is perfectly clear by the words of it. For it is sometimes made to depend upon the vote of the whole County, which by the same section of the Act, includes every town, township, parish, and other division or municipality (except a city) within the territorial limits of the County. Surely it is clear from this, as words can make it, that there can be no election in any place that is not a municipality and consequently that the Legislature intended the Act to come into force and affect municipal rights without a separate election in each municipality. But I am asked why then are cities to have separate elections? My answer to that question, as a Judge, is because the Legislature has said so in plain language, and if I am asked why they said so, although I cannot tell, I can only conjecture. It may have been that while they did not consider it good policy to have a separate election in all the towns and municipalities, they thought it would be good policy to have such in the municipalities that were cities as they knew they were few and important.

The rule laid down for the interpretation of statutes by the Court in *Reg. v. Berchet*,¹ is "that such sense is to be made upon the whole as that no clause, sentence or word shall prove superfluous, void or insignificant, if by any other construction they may be all made useful and pertinent," and Lord Holt in *Harcourt v. Fox*,² says "We would be very bold men when we are entrusted with the interpretation of Acts of Parliament to reject any words that are sensible in the Act;" and the rule is, where the language of an Act is clear and explicit the Court must give effect to it whatever may be the consequences, for in that case the words of the Statute speak the intention of the Legislature.

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¹ 11 Show. 108.² 11 Show. 522.

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Lord Denman in *Rex v. Archbishop of Canterbury*,¹ says, "My brother Coleridge's admirable argument has confirmed me in the opinion of the danger of exposing an Act of Parliament and the most simple construction of the plainest language to the speculations of those who will bring those forgotten books down and wipe the cobwebs from decretals and canons before they can find one argument for disturbing the settled practice of 300 years." Having so expounded the statute it only remains to enforce and administer the law as it is found to be, notwithstanding the consequences political or otherwise, and notwithstanding the fact that it may be a very generally received opinion that the particular enactment in a question does not produce the effect which the Legislature intended or might with advantage be disregarded. Again Pollock, Chief Baron, in *Miller v. Salomons*,² says, that words used in a statute must be considered to be used in the sense which they ordinarily bore in this country at the time the statute was passed.

Bearing these rules in mind, let us look at the statute. The words of the 2nd section are that in that Act the word "county" shall include every town, township, parish and other division or municipality (except a city) within the territorial limits of the county. Applying the first and the last rules to these words, it is plain, to make all those words have a meaning, there must be something understood by towns, townships, parishes and other divisions or municipalities that were not cities within the limits of some of the counties, and that those words would include the cities, otherwise there would be no necessity for the exception, for all exceptions must be part of what would be otherwise included. What were those according to the ordinary meaning of those words?

Is it not clear that such towns and municipalities as would include cities, if the cities had not been excepted, were places having municipal government, and either were designated towns by the Act creating their municipal powers, or in other words the municipality or such municipalities as were ordinarily called towns, and also other municipalities that were neither so designated or called? Apply them to the condition I have mentioned of Canada, and bearing all this in mind, to my mind it is impossible to use language more plain, explicit and impossible to be misunderstood, to express all towns in Canada, such as Moncton, which not only was designated a town in the Act giving it its municipal powers and rights but has been commonly called a town ever since, and never was designated or called a city, and therefore such is not the meaning that such language bore at the time of the passing of the Act. It was argued before me that a town and a city are the same thing. If so, I never heard of it before. I myself always understood that the word "city" meant only certain towns that had been declared cities; but if it were so, it is quite impossible for the Legislature to have used the words as synonymous in this statute, for towns were to be included in the county elections, unless such towns were cities and the cities are not. Then

¹ 11 Q. B. 483.² 7 Ex. 500.

it is equally clear that the fact that they were also municipalities would not make them cities, because such were also included unless they were cities, so that although cities might be either towns or municipalities or both, yet neither being a town nor a municipality nor both could make it a city without more, or the exception would be void as attempting to except all that is given. If the language of the Legislature is clear and plain, as I think it is, I have nothing to do with its policy or impolicy, its justice or injustice, with its taking away any revenues, municipal powers or franchises, or its being proved to be according to my ideas of right or to the contrary, I have nothing to do but obey it and administer it as I find it. I think to take a different course is to abandon the office of Judge and assume that of legislator.

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It has been suggested that if this construction is given, the licenses might expire at different times in the different municipalities in the same county, but giving the construction contended for and construing the word "city" to include all municipalities in which licenses have or may be granted, still any such may and continually do grant licenses to sell liquors, expiring at different times, so that if there was any difficulty in construing the 96th section as to when the Act would come into force, this would not get rid of it. But I think that the construction of that section is easy and free from difficulty. Even if the licenses in Moncton expire at different times from the rest of the county, the Act was to come into force in a certain time after the expiring of the annual or semi-annual licenses then in force in such county. From this it is clear that any other licenses, whether longer or shorter than annual or semi-annual, in no way govern. Then, if Moncton is included in the county of Westmorland and has any licenses either annual or semi-annual in force, as they would be in force in Westmorland, then the Act cannot be in force in any part of Westmorland before their expiring. So, with reference to any other such licenses in force in any other part of Westmorland, it follows that the time would not begin to run until the last of such licenses in force in any part of Westmorland had expired, and I cannot see how it is possible to give any other construction to the Act or what difficulty there is about it. The Act says that all towns in Westmorland that are not cities are intended to be included in the word "county" when used in the Act. Moncton is a town and in Westmorland, and is not a city. Then it follows that any license to sell liquors there is in force in Westmorland, although it is not in all Westmorland. True, such licenses do not authorize the sale in all Westmorland nor do they in all Moncton, nor do any other licenses authorize the sale in all Westmorland, only in some parts. So no matter what authority issued them they were in force in Westmorland and they have expired. There were other licenses authorizing persons to sell liquor and expiring at other times. Is not the first a license in force in such county as much as in the last? And could it be said that license to sell liquor in Westmorland had expired until the last of such licenses had so expired? Under this state of facts I think there can be but one construction of the words of the Act,

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"from and after the day on which such licenses then in force in such county or city, will expire." But if I thought otherwise, I would say, as was said by Sir M. E. Smith in delivering the judgment of the Judicial Committee of the Privy Council in *Cargo ex "Argos,"*¹ that the words of the statute are precise and unambiguous, and in spite of the anomalies pointed out, it would be difficult to say that when construed in their natural sense, they lead, to use the words of Baron Parke, "to manifest absurdity and must therefore be qualified." What he meant by the word "absurdity," is explained by Willes, J., in *Christophersen. v. Lotinga*,² was "to adhere to the ordinary meaning of the words used and to their grammatical construction, unless it is at variance with the intention of the Legislature to be collected from the statute itself, or leads to manifest absurdity or repugnance, in which case the language may be varied or modified, so as to avoid any such repugnance, but no further." Willes, J., subsequently proceeds to say that he subscribes to every word of that rule, except the word absurdity, unless it be considered as used there in the same sense as repugnance, that is to say, something that would be so absurd with reference to other words of the statute as to amount to a repugnance.

Then if the Canada Temperance Act is in force, does it repeal by implication the Act under which the defendant was convicted in this case? I think it does. The latter Act forbids the sale without a license from the sessions. The first forbids the sale without the license named in it, and authorizes the sale by such license. This is entirely inconsistent with the last named Act. An offence under the one Act would be an offence under the other, and each authorizes different tribunals to try it, different penalties and different applications of the fines. Surely there can be only one conviction for the same offence. The rule laid down in *Foster's case* (11 Rep. 61), is that when two statutes, although both are expressed in affirmative language are contrary in matter, the latter repeals the former. "The rule is," says Lord Coke, "*leges posteriores priores contrarias abrogant*," and the rule is, I think, well laid down by Dr. Lushington, in the case of the India (33 L. J., Ad. 193). It is not necessary that any express reference be made to the statute that is intended to be repealed. The prior statute would, I conceive, be repealed by implication, if its provisions were wholly incompatible with the subsequent one, or if the two statutes together would lead to absurd consequences, or if the entire subject-matter were taken away by the subsequent statute. By comparing the provisions of the Canada Temperance Act with the 105th chapter of the Consolidated Statutes, it is perfectly apparent that the entire subject-matter of the latter Act is taken away by the former and other provisions made in lieu thereof. It follows, in my opinion, that no conviction can be had under the latter for anything that is made an offence by the former wherever it is in force. These being my views in the whole case, it is apparent that unless the court took a different view on the two first points, the parties could not in this case get a decision on the third point on which there is a difference of opinion among the members of the court, even if I referred it to the court for advice, as I certainly should, notwithstanding my own opinion, if the case had turned on that point alone.

¹L. R. 5 P. C. 134.

²33 L. J., C. P. 121.

CASES DETERMINED
BY THE
SUPREME COURT OF NEW BRUNSWICK

IN
HILARY TERM, XLV. VICTORIA.

THE CARLETON, CITY OF SAINT JOHN, BRANCH
RAILROAD COMPY, APPELLANTS,

1882.

February.

AND

THE GRAND SOUTHERN RAILWAY CO., AND JOSEPH N.
GREENE, RESPONDENTS.

(Equity Appeal.)

Railway Company—Right to grant running powers over its line to another Company—Power of Railway Company to contract after the time limited by Act of incorporation—Specific performance of contract—When equity will enforce—Lease—Entire rent reserved—Consideration illegal in part.

The Grand Southern Railway Company was incorporated by 35 Vict., c. 47, (passed 11th April, 1872,) for the purpose of constructing a railroad from the city of Saint John to Saint Stephen, the capital stock to consist of at least \$2,000,000 and the liability of the stockholders restricted to the amount of stock they held; \$50,000 of the stock subscribed to be paid in before the operations of the company commenced; and that to entitle the company to the privileges of their charter the construction of the road should commence within three years, and should be *bona fide* continued from year to year, so that the whole be completed within eight years from the passing of this Act. No stock having been paid in under this Act, the time for commencing the construction of the road was extended by 37 Vict., c. 85; but the time for completion remained as before, and the company was authorized to commence the construction of the road as soon as \$20,000 of the stock was "subscribed" for. \$24,000 was subscribed for, but only \$1240 was paid in. The company did not complete the road within the time limited (11th April, 1880), and the Legislature refused to extend the time. On the 20th January, 1876, the company contracted with the Government to construct the railway mentioned in the Act of incorporation; to commence work by the 31st December following, and to complete the road by the 11th April, 1880, the government having power to terminate the contract by a six month's notice, unless the company gave satisfactory proof that the work was proceeding so as to be completed within the time limited. In January, 1879, the Government gave the company a notice under the terms of the agreement.

By Act 33 Vict., c. 39, the Carleton Branch Railway Co. was incorporated for the purpose of constructing a railway from the west side of the harbor of St. John to the European & North American Railway near Fairville, with power to take and hold land, &c., and provided that lands taken by the company should be held as lands taken and appropriated for highways. On the 30th April, 1880, the Grand Southern Railway Company (respondents) entered into an agreement with the Carleton Branch Railroad Company (appellants), whereby the appellants granted to the respondents for a term of fifteen years

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the right to connect their railway with the appellants' railway, and to run their trains over it, and to lay down sidings, &c., and also demised to the respondents certain lots of land, with the right to build station houses and freight houses on one of the lots; reserving to the appellants for the lands demised, and the rights and privileges granted, an annual rent. It was also agreed that, if during the fifteen years the respondents could not use the track on the Carleton Branch railroad, for certain specified causes, they (respondents) might build a track for their own use along-side of the appellants' railway, with necessary earth works, &c. And in case such track was constructed the respondents should pay the appellants a certain specified rent per annum, for so long thereafter as they should use the land for that purpose, and that they should have the right to use and maintain the second track at the especial rents for 999 years.

The respondents filed a bill, alleging that on the 2nd June, 1880, they commenced to grade their line of railway so as to connect with the Carleton Branch Road, but were prevented by the appellants. The Bill prayed that it might be declared that the Carleton Branch Railroad Co. was bound to perform and execute the agreement entered into with the respondents, and should be enjoined from preventing or obstructing the respondents from uniting their railway with the appellants' line, and from interfering with or hindering the respondents from passing with their locomotives, &c., over the appellants' road, in accordance with the agreement of the 30th April, 1880. An injunction order having been granted in the terms of the prayer:

Held, on appeal, by ALLEN, C. J., and DUFF, J., (WELDON, J., dissenting),

1. That the bill was, in effect, a bill for specific performance of an agreement, and before the Court would enforce it, it must be satisfied that there was no reasonable ground to contend that the agreement was illegal, or against the policy of the law.
2. That the agreement of the 30th April, 1880, having been entered into after the time limited by the Act incorporating the Grand Southern Railway Co. for the completion of the road, was *ultra vires*, and void.
3. That the agreement was not such a one as a Court of Equity would attempt to enforce; and whether it was valid or invalid, in view of the financial condition of the Grand Southern Railway Co., it was not an agreement which the Court ought to be active in enforcing.
4. *Semble*. That though the Carleton Branch Railway Co. might grant to another company a right to connect with their railway, and have running power over it, it had no power to grant to another company a right to construct a separate track along-side its own line, or to make such a demise of its lands as purported to be made by the agreement of 30th April, 1880.
5. That if the demise of the lands to the Grand Southern Railway Co. was illegal, it vitiated the grant of the easement or running powers over the Carleton Branch Railway, because one entire rent was reserved in respect to both; and the legal part of the consideration could not be severed from the illegal part.

Held, per WELDON, J., that as the effect of the injunction order was merely to preserve the *status quo*, until the rights of the parties could be determined on the hearing, the appeal should be dismissed.

The bill in this case was filed by the Grand Southern Railway Company for a declaration that the Carleton Branch Railway Company was bound to perform and execute the provisions and agreements in the indenture set out in the bill, and for an injunction order restraining the Carleton Branch Railway Company from preventing the Grand Southern Railway Company from connecting their railway with the Carleton Branch rail-

way, according to the terms and conditions of a lease dated the 30th day of April, 1880.

The material facts are stated in the judgment of Mr. Justice Duff.

His Honor, the Judge in Equity, made the injunction order, and delivered the following judgment :

This is an application for an Injunction order to restrain the defendants from preventing the plaintiffs' company from connecting their railway, which they are constructing under the Act of General Assembly of New Brunswick, 37 Vic., chap. 85, with the defendants' company's railway, which they had constructed under 33 Vic., chap. 39, and from running trains over the defendants' company's railroad, according to the terms and conditions of a lease made between the plaintiffs' company and the defendants' company, on the 30th April, 1880, under the common seal of the defendants' company, which was placed to it under the direction of the directors.

By this lease, as set out in the pleadings, besides many covenants and stipulations on both sides, the defendants' company profess to grant, demise, and lease to the plaintiffs' company the power and right to connect the plaintiffs' company's line of railway with the defendants' line, and for fifteen years to have and enjoy the right and privilege to run their locomotives, cars and trains from the point where the two railroads meet, over the defendants' railway to deep water in the harbor of Saint John, with the right and privilege to construct and lay down all necessary switches, sidings, turnouts, turn-tables, and other things requisite to enable the plaintiffs' company to complete their line of railway, and carry on their railway business. This clause, by other clauses in the deed, is restricted in a variety of ways, and there is also provision made for a lease of the right to lay down another track on the land acquired by the defendants' company for the purpose of their railway within the limits aforesaid. The right of the plaintiffs to have this relief prayed for, is challenged by the defendants on a great variety of grounds. But in the view I take of this case, the only ones I need to notice are :

First.—Whether or not such lease was void, because the eight years mentioned in the 12th section of 35 Vic., chap. 47, and in the 7th section of 37 Vic., chap. 85, had expired before this lease was made, and this railway is not completed, and therefore the corporation was extinct?

Second.—Whether the defendants' company had any right to make such a lease, or to grant the powers and rights that I am asked to enjoin the defendants' company from interfering with?

Third.—Whether the plaintiffs' company had any power to take such a lease, or to acquire such rights and powers?

Fourth.—Whether, if the defendants' company had power to make such a grant, the directors of the defendants' company had power to authorize the affixing of the common seal of the company to such an instrument without first obtaining the sanction of the stockholders?

Fifth.—If the deed so executed was valid, whether it was not such

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an instrument as specific performance would not be decreed of; and if not, whether an injunction ought to be granted?

As to the first point, I think the corporation is not out of existence merely from not having performed the acts mentioned in the sections referred to. Those sections do not declare that if those things are not performed, the chartered rights of the company shall be forfeited, nor that the corporation shall be dissolved; but only, that to entitle the company to the privileges of the charter, they should commence the construction of the road in five years, and complete it in eight. Even if these words were equivalent to a forfeiture of the charter, still I think such forfeiture would not, *ipso facto*, make the corporation extinct. If the Legislature had fixed a definite time in which the charter would expire, as for instance eight years, then the corporation would have been dissolved at the expiration of that time, and so extinct; but if the continuance of the corporation beyond that time was made to depend upon the performance of a given condition, then I think that the non-performance of the condition would be a mere ground of forfeiture, which could only be taken advantage of by information in the nature of a writ of *quo warranto*, to enquire by what warrant the members exercised the corporate power, having forfeited it by the non-performance of the condition. 1 Blackstone Com., 485. I therefore think there is nothing in the first point.

As to the second point, I think that although the defendants' company are a corporation, and themselves hold the property and franchise which are known as "The Carleton, City of Saint John, Branch Railroad," which they had built under the Act 33 Vic., chap. 39, and they were entitled to operate and use it in the manner in which they had attempted to grant and lease it to the plaintiffs' company, yet I think they held such rights in some respects as Trustees for the public, and had no right to part with them except so far as the Legislature has authorized them to do so. Lord Cranworth, in *Hawkes v. The Eastern Counties Railway Co.*,¹ said, when moving the judgment in the House of Lords, "that it was settled law that when a statutory corporation is created by Act of Parliament for a particular purpose, it is limited in all its powers by the purposes of its incorporation, as defined by that Act," and Lord Justice Cairns, in *Gardner v. The London, Chatham and Dover Railway Co.*,² says "that when Parliament, acting for the public interest, authorizes the construction and maintenance of a railway, both as a highway for the public, and as a road on which the company may themselves become carriers of passengers and goods, it confers powers, and imposes duties and responsibilities of the largest and most important kind, and it confers and imposes them upon the company which parliament has before it, and upon no other body of persons: and those powers must be executed, and those duties discharged by that company. They cannot be delegated or transferred. The company would of course act by its servants, for a corporation cannot act otherwise, but the responsibility will be that of the company. The company could not by agreement hand over the management of the

¹ 15 H. L. C 581.

² L. R. 2 Ch. Ap. 212.

railway to the debenture holders." And I think the same principle would prevent this company from so handing over any part of such management without legislative authority. *Ergo*, to enable the defendants' company to do what they have attempted to do, it must be that they have not parted with any of the management of their railway, or that they have legislative authority by their act of incorporation or otherwise to do so. The first would be, to show that what the plaintiffs' company were to do, was to be done as the servants of and under the control of the defendants' company: a matter which, in the view I take of the case, is not necessary for me to decide. For I have come to the conclusion although with some doubt that there is power given to the defendants' company by their Act of incorporation to lease their railway and give the right to make the connection therewith, as far as I am asked to restrain the defendants' company from interfering with the plaintiffs in having the enjoyment thereof; and I further think that the said deed does convey as much of the said defendants' railway as is necessary for that purpose.

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The Act incorporating defendants' company is 33 Vic., chap. 39, by which it will be seen that defendants' railway is a short line running from Fairville, in the parish of Lancaster, to deep water on the western side of the harbor of Saint John, a distance of about five miles, and so situate that it can conveniently carry over it the traffic of all lines of railway running to, and ending on the western side of the harbor. The company was not itself compelled to run any trains or work the railroad. The city of Saint John was authorized to take stock to the amount of \$40,000, in effect for the inhabitants of the western side of the harbor, commonly called Carleton. The fifth section authorizes the company to purchase and hold land, &c., within or without the Province for the use of this road, and to make such connection with other railroad company or companies on such terms, and for such length of time, as might be agreed upon, &c. It will be borne in mind that the Legislature use this language after they had given by the first section full power to connect with the E. & N. A. Railroad at Fairville, as laid down in 30 Vic., chap. 12, and by the first section, the company was invested with all the powers, &c. which were or might be necessary to carry into effect the purposes and objects of the Act, and then by the 17th section the Act declares that every deed executed by the directors of the company shall be under the common seal, and shall be as binding upon the company as if it was part of the Act itself. In construing this Act, I think it important to ascertain, if I can, what were the purposes and objects of the Act, as without that I cannot tell what the Legislature meant, when they said in the 1st and 5th sections that the company would have all powers necessary to carry into effect such purposes and objects.

The Act has no preamble from which I could gather its objects, so I am driven to the words of the enacting clause and the surrounding circumstances in which the Act was passed, to ascertain what such objects were, and I think, by reading the 1st, 5th, 8th, 9th, 10th, 11th and 12th sections, and knowing the geographical position of Carleton, and the position of this railway, such objects were to have a line of

1882. railway built from the terminus of the E. & N. A. Railway at Fairville over the most practicable route to deep water in the harbor of Saint John, and connected with the E. & N. A. Railway, and that any other railway that might run in the vicinity might be connected with it, and the traffic thereof induced to pass over it to the harbor of Saint John, thereby adding directly to the receipts of such railway, also indirectly benefiting the inhabitants of Carleton by reason of the increase of business occasioned thereby; and this was intended to be done first, by connecting with the E. & N. A. Railway, as appears by the first section; secondly, by making connection with other railroad companies within or without the province, either by leasing to them, or by consolidating their stock with such other company or companies, as appears by the 5th section. If this is made sufficiently plain by the words of the Act as applied to the surrounding circumstances, then other words of the Act plainly say that the company shall have all the powers necessary to carry into effect such objects, and it is noteworthy, that while the first section gives them the power to purchase or take land necessary for the operation of the railway, it nowhere compels, or by words, authorizes, them to work the railway, but instead, apparently authorizes them to connect with other roads by leasing or amalgamating. It appears to me that when the power is given by such an Act to connect by leasing, it has a very different meaning from such a power given to a company operating its own railway to connect that railway with another. It appears to me that the only way that a power to connect with other railways by leasing their own—in other words the use of their own to companies operating those other roads according to this Act, that is, on such terms and for such a length of time as may be agreed upon, would be to grant to each of the companies that may so connect, the right to connect and to run their carriages over the road at such times and on such terms as are agreed upon; the several objects being that the defendants' company are to make money from any using of their road by any other companies that could be induced to use it up to its capacity. And the company should so guard the public by the time granted for the use to each, and the terms on which they would be allowed to use it, that the public safety would be secured; and upon the whole I think these objects are what is meant by the words, "all such power and authority to carry into effect the objects of the Act, and make connexion by leasing their road on such terms and for such time as may be agreed upon."

I therefore think that at the time of the making of the said deed, the defendants' company had power to confer upon the plaintiffs' company all the rights that the plaintiffs asked me to prevent the defendants interfering with their enjoyment of, if the plaintiffs' company had power to receive such rights.

The next question is, Is the deed in question a sufficient exercise of such power, as far as the defendants' company is concerned? I think it is. It will be seen by the words of it, that it contains words of present demise and grant, and is under the common seal of the company; and, even if by it, the defendants' company have attempted to

lease or grant anything that they have no power to do, and in that have exceeded their powers (upon which a great many questions have been raised before me, and upon which I offer no opinion,) I think it would operate as far as they had the power. *Campbell v. Leach*.¹ And I think if any powers are attempted to be given by the deed, that are not authorized, and are detrimental to the company, such would be controlled by this Court. See the judgment of Willes, J., in *Pickering v. Ilfracombe Railway Co.*²

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Then the next point—Had the plaintiffs' company power to take the lease in question? This, to my mind, is the most doubtful point in the case; for I think the Directors of the plaintiffs' company had no right to apply or pledge the funds of the company to any other purpose than those contemplated by their acts of incorporation; nor had they any right to accept any liability for their shareholders in running any railway, except what was contemplated by such acts. It is true that the shareholders in plaintiffs' company are not complaining, and have in fact adopted the lease by bringing this suit; and objections come with bad grace from the company who have made this deed, to attempt to defeat it, not by complaining of the non-fulfilment of its terms by the plaintiffs' company; yet it must be borne in mind that if the plaintiffs' company had no power to accept it, the defendants' company may at any time lose the whole benefit of the covenants in it in their favor, and therefore, in justice to their stockholders, they ought not to allow them to be bound by it, unless it is binding upon both parties. Then have the plaintiffs such power? Upon a full consideration of all the Acts, I am inclined to think they have. At the outset, it is important to bear in mind that by its Acts of incorporation the plaintiffs' company are made a body corporate, and are given all the general powers and privileges incident to a corporation by Act of the Assembly of this Province. Then what are these powers? This depends upon chapter 31 of Revised Statutes, which was in force at that time, and when no other provisions are specially made, they are, among other things, to be capable of holding real and personal estate. This, I think, would of itself authorize them to take this property, which the defendants' company are authorized to convey, if there are not provisions specially made in the Act incorporating the plaintiffs' company forbidding it, either by express words or by necessary inference; and I doubt whether the English authorities, decided under the Companies Act in England, are strictly applicable to such a corporation, with reference to which the head note of the case of *Ashbury Railway C. & I. Co. v. Riche*,³ reads that a corporation under the Companies Act is not thereby created a corporation with inherent Common Law rights. That no doubt is true with reference to corporations under the Companies Act, but cannot be true with reference to such corporations as the plaintiffs' company; for, as I have shown, their Act expressly creates them a corporation with all the general powers and privileges made incident to a corporation by Act of Assembly, one of which was to hold real estate, which by chap. 118,

¹ Ambler, 740.² L. R. 3 C. P. 235.³ L. R. Eng. & Ir. App. 653.

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sec. 14, is defined to mean, "lands, houses, tenements, and hereditaments, and all rights thereto and incident therein," and they are authorized to take and hold personal estate besides, so that what was intended to be conveyed to them in this deed would be included in what they are authorized to take and hold, and as the general object was to run and manage railways with reference to such a corporation, I think I have a right to say, as was said by Mr. Justice Blackburn in *Taylor v. The Chichester & Midhurst R. Co.*,¹ I think I am entitled to consider the question to be, not whether the present plaintiffs' company had by authority of the Act of incorporation, authority to make the contract, but whether they are by that Act forbidden to make it. And it might be conceded that this forbidding might be by express words or necessary implication.

Let us look at the two Acts incorporating plaintiffs' company, and see if the accepting this grant is forbidden either by express words or by implication; and as the Act incorporating the defendants' company was in existence at the time of the passing of those Acts, we have a right to look at it. We have also a right to consider the circumstances existing at the time of the passing of the Act incorporating the defendants' company, and the objects of the several Acts in construing their words.

First, then, the defendants' company had a railway, or the right to build a railway, that would be calculated to carry any traffic that might be brought eastward to the western city line, or to any point between that and Fairville, and thence to the harbor of the city of Saint John, which they had no rolling stock to work, and were not expected to work, but were authorized to lease running powers to any other railway company.

The plaintiffs' company were authorized to build a railway from St. Stephen to St. John or its vicinity, and to make such branches thereof as they might deem proper; and for this purpose, the right to purchase and to take the real estate of corporations as might be necessary both for the construction and convenient operation of the Railway, and the branches thereof; and if it was not intended either that the plaintiffs' company should accept a lease that would give them the necessary use and running powers over the defendants' road which they were authorized to give, or to connect with their road, the great bulk of the heavy traffic would stop short of the harbor of Saint John, and if their Act either authorized them to extend and operate their line into the city to the harbor, or to connect their road with the defendants' road, and lease sufficient of that road to complete a branch or extension to said harbor, then such traffic could be so carried, and both roads greatly benefited.

We have the Act incorporating the defendants' company, authorizing them to make connection with any other railroad by leasing their line, as I have before pointed out; and we have the plaintiffs' company authorized to build the road to Saint John, with all necessary appendages, and also to make such branches thereof as they might

¹ L. R. 2 Exch. 384.

think proper, and to hold so much of the real estate of other corporations as might be necessary for the convenient operation of the plaintiffs' road.

It must also be borne in mind that at the time of the passing of the Act incorporating the defendants' company, the Act 30 Vic., chap. 12, entitled "An Act to authorize the connection of railway lines and to provide for the management and regulation of connecting lines of railroad in this Province," was in force, and by Sec. 2 of the Act it was enacted "that a corporation owning a railroad, or the lessee or lessees thereof, were required to draw over its road the cars of any other railroad connecting with it" on terms therein mentioned. And the third section authorized any of such companies owning either of the connecting roads to draw its cars over the road with which it was connected in case the owner of the road refused to do so. With all this legislation on the subject of connecting railroads, although this Act had expired at the time of the passing of the Acts incorporating the plaintiffs' company, having been had in this Province, I think we ought to look at all these circumstances to show the meaning that had been attached to connecting railway lines, and if the plaintiffs' railway came in contact with the defendants' road, which the defendants' company had a right to connect with and lease to, I think the doing so might, under these circumstances, be convenient for the operating of the plaintiffs' company, and therefore for the carrying into effect the purposes and objects of the Act incorporating the plaintiffs' company. At all events, I do not think I can say that under these circumstances the defendants' company are by their Act of incorporation forbidden to take this lease or those powers, either by express words or by necessary implication; and until that is apparent, I cannot see that I would be authorized to deprive them of the benefit of that which the defendants themselves have given them.

The next question is, whether the directors of the defendants' company have power, without first consulting the shareholders, to make this lease. If I had any doubt whether they had by the express words of the Act of incorporation, I think it cannot be pretended that they are forbidden to do so by the Act, and there is nothing to prevent the shareholders in the company from giving such a power to them, or anybody else. It is true that the power to bind the company is vested in each individual member thereof, and no act of the company can bind it except it is authorized by the Legislature, or it is done by the consent or authority of the whole of the corporators. It has been supposed by some that acts could be authorized at a general meeting of the stockholders, but no general meeting *could* bind the stockholders, whether present or absent, except to those acts to which they themselves assented, or such acts as the Legislature authorized such general meeting to do, or such acts as the corporators had allowed to be done at a general meeting, from which their consent would be inferred, and the same rule would apply to the actions of directors. You must seek for their authority either in the Act, or the practice of the company, or a direct authority from every corporator. If neither the Act, nor the joint agreement of all the corporators placed the making of

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a bye-law, or the right to affix the seal of the company to a contract, or to make a contract, and the business of the company required in the management of it to have a bye-law or contract made, and the general management of the company's affairs was given to the directors, then they, and they alone, could make the bye-law or contract, or affix the seal. For a corporation can only act by agent, and its seal; or, if the Act was silent on the subject, and it was the practice of the directors to make such bye-law or contract, or to affix the seal, then, if they did so in a matter of the legitimate business of the corporation, the corporation would be bound, unless indeed the directors were forbidden to do so by the Act of incorporation. It has not been proved before me that they have not such power. True, it is stated in the affidavit of J. Murray Kay used on the part of the defendants, "that he was informed, and believed, that this lease was made and executed by the directors without any authority from the stockholders," but such statement is mere belief, and may be a conclusion of law. No facts are stated to negative the directors having such authority. They may have been authorized by a bye-law which Mr. Kay knows nothing of, or if he does know, he believes to be invalid, and besides, it appears to have been the practice for the directors to do such business for they made a similar contract with the E. & N. A. Railway Co., which was acted on for a number of years without any objection from the shareholders, and afterwards, another with the St. John & Maine Railway, Mr. Kay himself acting for the St. John & Maine, and this power never was challenged by the stockholders.

Then the common seal is affixed, and in *In re Barned's Banking Co.*,¹ Lord Justice Cairns says: "The authority to affix the seal of the corporation is challenged. The seal is affixed, and the document is *ex facie* regular in all respects. The onus on this issue is on the official liquidator of the corporation," and further on, he says: "whether or not it was the practice to have, generally speaking, resolutions authorizing the affixing of the seal showing that where it was the practice for the directors to do so, the company would be bound even in the absence of any other authority;" and to the same effect is the case of *D'Arcy v. Tamar & Callington Ry. Co.*,² in which Bramwell, B. says: "When an instrument is produced under the seal of the company it is *prima facie* to be taken that the seal was properly affixed." I therefore think that there is no evidence in this case to justify me in finding that the directors had no power to affix the common seal of the company to this deed.

If I am right thus far, it follows that the plaintiffs' company had the legal right to connect their road with the defendants' and to run their cars over it, and when the defendants interfered with them, and tore up their work, they became guilty of a trespass. And if similar trespasses are allowed to be committed by them, they will do large injury and damage to the plaintiffs—injuries for which damages would be an inadequate and uncertain remedy. I therefore think that they are entitled to an injunction to protect their right in *specie*,

¹L. R. 3 Chanc. 118.

²L. R. 2 Ex. 122.

as being the only mode of doing complete justice, even though they might not have been entitled to a specific performance of such an agreement, if it had been executory, according to the principles laid down in *Joyce on Injunctions*, page 908, for which he cites *Warburton v. The London & Blackwall R. Co.*¹ Whether they may be entitled to a specific performance is quite another question. All I now decide is that they are entitled at all events to the protection of the property that is already theirs.

A good deal has been said on the argument, that the directors of this company granted this lease without consulting the shareholders, and when they believed that a majority of such shareholders were opposed to it. On the other hand, it is alleged that a majority of the shares of the company have been bought up by the St. John & Maine Railway, in order to sacrifice the interest of the rest of the shareholders to the interest of the St. John & Maine; and on the one hand, it is alleged that Mr. Leonard, one of the directors who granted this lease, was a servant of and in the pay of the lessee at the time the lease was granted. This, however, he denies; and on the other hand it is alleged that of the three directors put in by a majority of the stockholders, one is the manager of the St. John & Maine Railway, another is the superintendent of that railway and is paid a yearly salary by it, and the third is the solicitor of that company, and that their action in endeavoring to defeat the plaintiffs' company's right is entirely in the interest of the St. John & Maine Railway, and not for the benefit of the defendants' company. And if it be true as is alleged, that a great portion of the business of the defendants' company is with the St. John & Maine Railway, it is difficult to see how these gentlemen can properly serve both masters. They, however, are all persons of the highest respectability, and have on their oaths stated that they acted in this matter only in the interest of the defendants' company, and I believe them. At the same time, I recognize that it is quite possible that the relations with, and the duties they owe to, the St. John & Maine Ry. might seriously affect their judgment in the exercise of their duties and the trusts that they owe to the shareholders in the defendants' company. With these perplexing questions arising on both sides, I think I have not sufficient evidence to deal with in the present state of the litigation. In this case I feel that the interests of all parties require a speedy decision, and in the decision and application of some of the many intricate and important principles involved, I recognize that it is quite probable I may be in error, and therefore in enforcing the views I now entertain as to the rights of the parties, I think it right to guard those rights as far as possible from being injured by an erroneous opinion I may have come to. And as it appears that the plaintiffs' company is of doubtful ability to answer in damages for their acts, in case it should be finally determined that the acts under the right claimed are unauthorized by law, therefore I would make it a condition to granting any injunction order in this case, that plaintiffs shall procure a bond to be given by a responsible party in the penal

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sum of five thousand dollars, conditioned that if it should be finally determined in this suit that the said Grand Southern Railway have no right to do the acts which the defendants are to be enjoined from preventing their doing, they will pay to the defendants all damages that may be occasioned to them by such acts. Such damages to be assessed by this Court.

Upon such bond being entered into, I will order that the defendants be restrained from interfering with, preventing, or in any manner obstructing the plaintiffs from meeting with, joining and connecting of their line with the rail of the defendants' line, and from making and placing the necessary frogs, switches, and other things necessary to make such connection, and also from interfering with or in any manner obstructing the said plaintiffs from passing with their locomotives, cars and carriages, to and from the said junction along the track of the Railway of the defendants in accordance with, and subject to the terms, condition and provisions of the indenture of agreement and lease made on the 30th day of April last, between the Grand Southern Railway Company and defendants, and set out in the plaintiffs' bill.

I reserve the question of costs.

The Carleton Branch Railroad Company appealed from this order.

Oct. 26 and 27, 1880. *Barker, Q. C.*, and *E. McLeod*, in support of the appeal. If the directors of the Carleton Branch Railway Company can execute a deed at all, it is clear they could not execute such a one as the deed of the 30th April. By it, they profess to lease the land for a long term of years, and to authorize the respondents to build a second track. The most they could do, was to grant an easement giving the respondents running powers. The contract was entire, and the payment of the sum reserved was the consideration for both the demise of the land and the easements granted. If the court come to the conclusion that the company had no power to make the demise, it is impossible, without making a new contract, for the parties to apportion the consideration, and apply part to the demise or lease of the lands, and a part to the right to run over the road. The case of *Campbell v. Leach* merely decides that if a person exceeds his authority in executing a power, the execution will be good as far as the power extends. In *Pickering v. Ilfracombe Ry. Co.*,¹ Willes, J., says, p. 250, "Where you can't sever the illegal from the legal part of a contract, it is altogether void." The directors had no right to make the lease without consulting the shareholders. They made this lease to

¹L. R. 8 C. P. 225.

an insolvent company, only three days before the annual meeting of the Carleton Branch Railway Company.

The Grand Southern Company had no right to enter into the contract. All their charter rights were extinguished before they entered into it. They could not, after the 11th of April, expend the money of the shareholders in either leasing or building railroads. They only existed as a corporation for the purpose of winding up their affairs. The charters of private companies are construed very strictly. *Wood v. The Carleton Branch Ry. Co.*¹ The Grand Southern were authorized to "build" a road, but they were never authorized to lease one. *East Anglian Ry. Co. v. Eastern Counties Ry. Co.*;² *Colman v. Eastern Counties Ry. Co.*;³ *Mayor of Norwich v. Norfolk Ry. Co.*;⁴ *Bostock v. North Stafford Ry. Co.*;⁵ *Shrewsbury Ry. Co. v. North-western Ry. Co.*⁶ If they can lease at all, they cannot lease part of the road. *Salomons v. Laing*;⁷ *Bagshaw v. Eastern Union Ry. Co.*;⁸ *National Manure Co. v. Donald*.⁹

Considering the financial state of the company, and the fact that they had failed to complete the road within the time limited by the charter, and that the Legislature had refused to extend the time, we submit the Court of Equity should not assist them to acquire property. It is not such a contract as the Court would enforce specific performance of, and if it is not, the injunction order should not have been made.

The Judge in Equity had no right to speculate on the intentions of the Legislature, or to use his knowledge of the geographical position of Carleton, or, that great bugbear, the traffic to St. John.

Kaye, Q. C., Weldon, Q. C., and Skinner, Q. C., contra.

The lease was within the power of the appellant company, and being under the company's seal, it must be presumed to be good. *Royal British Bank v. Turquand*.¹⁰ *Midland Railway v. Great Western Railway*;¹¹ *South Wales Railway Co. v. Redmond*;¹² *Astley v. Manchester Railway Co.*¹³ The tendency of the Courts is now to give a liberal construction to Acts grant-

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¹ Pugs. 244.² 11 C. B. 775.³ 10 Beav. 1.⁴ 4 E. & B. 396.⁵ 4 E. & B. 798.⁶ 6 H. L. C. 113.⁷ 12 Beav. 339.⁸ 7 Hare 114.⁹ 28 L. J. Ex. 185.¹⁰ 5 E. & B. 248.¹¹ L. R. 8 Ch. 841.¹² 10 C. B. N. S. 674.¹³ 2 DeG. & J. 453.

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ing powers to companies. The appellants are estopped from setting up that they had no power to execute the lease at all; at all events, they having professed to exercise the power, the onus is on them to shew that it did not exist.

The Grand Southern was in existence as a corporation at the time of the execution of the lease. [ALLEN, C. J. I did not understand the argument of the appellants to be that the company had ceased to exist, but that their compulsory powers having ceased, the Court would not assist them to acquire property.] They contended that the charter was forfeited, and the Crown might at any time intervene, and put an end to the corporation. The Crown has not power to forfeit the charter. The charter would not be forfeited for the non-performance of the conditions, unless it was expressly stated that the non-performance would work a forfeiture. Assuming that there has been a cause of forfeiture, that would not, *ipso facto*, destroy the corporation. It might occur just before the completion of the road. The Attorney General is the only person who can take proceedings to forfeit the charter, and he can only proceed on substantial grounds. *Atty. General v. Great Eastern Ry. Co.*¹ The appellants have no right to refuse to perform their contract, because proceedings may be taken to forfeit the charter of the Grand Southern Railway Company. Another point was that the Grand Southern Railway Company had no power to accept the lease. There is nothing in their charter to prevent it. Section 7 authorizes them to connect with any existing road. This was a portion of the road which they were authorized to construct. It was competent for them to make their terminus any where in the vicinity of St. John.

The injunction order merely preserves the *status quo* till the rights of the parties can be determined at the hearing, and care has been taken to secure the appellants from loss. The Court should not decide upon the merits of the case upon this appeal.

Barker, in reply. It is not necessary, in order to determine that the Grand Southern Railway Company had not a right to make this contract, to come to the conclusion that they had no existence as a corporation after their failure to complete the road within the time limited by the Acts. It is clear the

¹11 Ch. D. 449.

Legislature never intended that they should have the power to make a contract to build a road after the 11th of April, 1880. The contract is *ultra vires* of the directors, and is not binding on the company. *Ashbury Ry. Carriage & Iron Co. v. Riche*.¹

Cur. adv. vult.

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The following judgments were now delivered :

DUFF, J. The bill in this cause sets out an indenture, bearing date the 30th day of April, A. D., 1880, between the appellants (the defendants below) of the first part, and the Grand Southern Railway Company of the second part, whereby the appellants granted to the parties of the second part, their successors and assigns, for a period of fifteen years from 1st May then next, the right to connect their railway with the appellants' railway, and during that period of time, to run their locomotives and trains over a portion of the appellants' railway, with the privilege of constructing and laying down switches, sidings, etc., etc., and all other things necessary for the purpose of constructing and completing their line of railway, and carrying on the business thereof. By the same indenture the appellants granted and demised to the Grand Southern Railway Company certain lots of land therein described ; and also the right to build and use a turn-table, station house and freight house on the lot of land at the head of Rodney Slip, described in 34th Vic., cap. 2, sec. 7, but so as not to interfere with the appellants' present line of railway ; and one entire rent or sum of \$100 per month for the first five years, and \$125 per month for the second five years, and \$150 per month for the third five years, was thereby reserved and made payable in respect of the lands thereby demised, and the rights and privileges thereby granted. Amongst other covenants and agreements contained in the said indenture, as set out in the bill, is an agreement that, in case it should happen during the said period of fifteen years, that the Grand Southern could not use the single track on the appellants' railroad, without interfering with the business of the St. John and Maine Railway Company, or, in the event of the appellants or their lessees using or obstructing the said single track in such a manner as to prevent the Grand Southern from conveniently using it, the latter, on giving three months

¹ 17 L. R. Eng. & Ir. App. 653.

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notice in writing, might proceed to build another track alongside of the appellants' track, for their own use, with the necessary earth and other works to support it; provided, however, that such second track should be far enough away from the appellants' track, not to interfere with the business and trains upon the latter. And it was also thereby agreed that, in the event of such second track being constructed, the monthly rent thereinbefore reserved should cease; and that, from and after the construction thereof, the Grand Southern Railway Company, their successors and assigns, should pay unto the said appellants for the privilege of using their land for the purpose of maintaining such second track, \$100 per month for the remainder of the said term of fifteen years; \$300 per annum for the next twenty-one years; and \$400 per annum for so long thereafter as the Grand Southern should use such land for that purpose; which several rents, the Grand Southern covenanted to pay quarterly. And the Grand Southern Railway Company, by that indenture, was granted the right to use and maintain such second track, at the rents mentioned, for the term of nine hundred and ninety-nine years, from the time when the same should be laid; and, during all that time, that they should have the right to lay down and construct switches, turn-tables and turnouts, in connection with such second track. And the Grand Southern Railway Company covenanted with the appellants to pay them one half the expense of repairing and maintaining the present track, its road-bed and supports, so long as they should use it; and also, should a second track be laid, to pay the expense of keeping the road-bed in repair, so far as it might be used or affected by such second track; and also, at all times thereafter, during the continuance of that indenture, to obey and abide by any reasonable time-table, made by the appellants, for the regulation of the traffic and business of the appellants over their line; and also, to obey all reasonable time-tables made by the St. John and Maine Railway Company, by authority of the appellants, over the latter's line. And, in case the appellants should not make any reasonable time-table, then, that they, the Grand Southern Railway Company, will make one for the running of their trains over the appellants' line, and

will submit it to the appellants for their reasonable approval; and will alter and amend the same from time to time, reasonably, to suit the reasonable requirements of the appellants. The Grand Southern Railway Company also covenanted by that indenture, not to use the rights, privileges, property, franchises, liberties, easements, and lots of land thereby granted and demised, or any of them, in such a way as to interfere with the reasonable enjoyment of any right, privilege, property, franchises or easements, that the said St. John and Maine Railway have in connection with the appellants' property and railway, and also that they will, at all times, provide the necessary attendance, care or other protection, whereby the St. John and Maine Railway Company, and the appellants, or other company, shall have the safe use of the appellants' railway, for the safe running of their locomotives, cars and trains thereon, with a view to the public safety, to the fullest extent. And the indenture also contains a covenant that any differences and disputes between the parties thereto, shall be referred to arbitration, and that the award of the arbitrators, or any two of them, shall be final.

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After setting out this indenture, the bill alleges, amongst other things, that the respondent Greene, after its execution, on the 2nd June, 1880, on behalf of himself and the other respondents commenced to grade the line of the Grand Southern up to the appellants' line, with a view to connecting with the latter; but that he was prevented from proceeding with the work by parties who professed to represent the appellants. By paragraph 29, the respondents allege:

"That it is necessary and absolutely requisite, in order to enable the plaintiffs to equip and complete their said railway, and to get it ready for traffic, that they should be able to unite with and make the necessary connections with the line of the defendants' company, and have and enjoy the right to pass over and along the defendants' line to, and from the junction of the two roads to the water terminus of the defendants' road in Carleton, or near thereto, in accordance with terms and provisions, and subject to the conditions of the said lease."

The Bill prays, "That it may be declared that the said defendants are bound to perform and execute the provisions and agreements in the said indenture contained, on their part to be performed and executed; and that they may be enjoined by order of injunction from interfering or preventing, or in any manner obstructing the

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plaintiffs or either of them, from uniting with and forming a junction of their lines with the track of the said defendants, and making and placing the frogs, switches, and other connections necessary to complete such connection and junction; and also from interfering with, or in any manner hindering and obstructing the said plaintiffs from passing with their locomotives, trucks, cars and carriages, to and from the said junction, along the track or railway of the defendants, in accordance with, and subject to the terms, conditions and provisions of the indenture of agreement and lease, dated 30th day of April last."

On the 17th July, 1880, the learned Judge in Equity made an injunction order, enjoining the Carleton Branch Railway Company, their directors, manager, &c., in terms of the prayer of the bill in that respect. Against His Honor's order in that behalf the Carleton Branch Railway have appealed; and, after a careful consideration of the subject, including the facts set forth in the affidavits which were read on the motion for injunction, I am of opinion that the appeal should be allowed, and that the injunction should be dissolved.

This bill, it will be observed, has a two-fold object in view; first, to obtain a declaration of the Court affirming the validity of the agreement set out in it; and next, the active interference of the Court to enforce its performance, by a process in the nature of a mandatory injunction. The right to the injunction necessarily pre-supposes the affirmance by the Court of the obligatory character of the agreement, without which neither of the respondents shews any equities whatever on which to found a claim to it. "Such a bill, if it is not a bill for specific performance in form and letter, is so in substance and in spirit, and the same rules must be applied to the case, as would be applied to a formal bill for specific performance. And before the Court can act, in the exercise of its peculiar jurisdiction to enforce specific performance of an agreement, it must be satisfied that there is not a reasonable ground for contending that the agreement is illegal, or against the policy of the law; and in the next place, that it is one ascribable to a class in which the Court has been accustomed, or has certainly jurisdiction to interfere." Per Lord Justice Knight Bruce in *Johnson v. The Shrewsbury and Birmingham Ry.*¹

It is true that the bill asks for a declaration of the obligatory character of the agreement only as against the appellants;

but such a declaration in this case would involve the affirmation of the corresponding obligations on the part of the other parties to it.

Being under the seals of the respective companies, parties to it, it is no doubt, *prima facie*, binding upon both. But the seal of a corporation to a document does not bind the company unless it has been *legally* affixed to it. It will not do so, "when it appears by the express provisions of the statute creating the corporation, or by necessary or reasonable inference from the enactment, that the deed is *ultra vires*; that is to say, that the Legislature meant that such a deed should not be made." *South Yorkshire Railway Co. v. The Grand Northern Railway Co.*; ¹ *D'Arcy v. Tamar, &c., Railway Co.*; ² *Fellows v. The Albert Mining Co.*³

To say the very least of it, I think that there are strong "grounds for contending" that this agreement is illegal, and is not binding upon either of the parties to it.

I am of opinion that it was quite competent for the Carleton Branch Railway Company to enter into an agreement with, and to grant to any other railway company—themselves capable of becoming a party to such a contract, and accepting such a grant—a right to connect with their branch line, with running powers over it. But I am unable to discover any power that it has to grant to another railway a right to construct a separate track alongside of its own; and I have great doubt if it has power under its charter to make such a demise of any of its lands as is purported to be made by the indenture set out in the bill of complaint. The 33rd Vict., c. 39, which incorporates the appellants, enacts, amongst other things, that *all* the lands which may come into their possession shall be held by them, "as lands taken and appropriated for highways." We have not, indeed, before us the conveyance of the lands in question, from the City of St. John to the appellants; but, whatever may be the terms of such conveyances, I cannot understand, how, in the face of such a legislative declaration, the company could acquire such a title to any lands, as would enable them to transfer their exclusive possession, for a long term of years.

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¹ 10 Ex. 55, 84, per Parke, B.² L. R. 2 Ex. 158.³ 3 Fagn. 208.

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And if such demise of the land be illegal, it will vitiate the grant of the easement or running powers over the appellants' line, and both must fall together, because one entire monthly rent or consideration is reserved and made payable in respect of both. It would be impossible for the Court, without making a new agreement between the parties, to divide the consideration between the different subjects of it, and apportion to each its share. In such a case, I cannot accede to the position of the learned Judge in Equity, that the agreement would operate, so far as it came within the powers of the company to grant, and would be bad only for the excess. I fail to see the application of *Campbell v. Leach*,¹ which he cites in support of it; and at all events, that case has been questioned by Lord Redesdale, in *Shannon v. Bradstreet*.² And the language of Mr. Justice Willes, in *Pickering v. The Ilfracombe Ry. Co.*,³ to which he also referred, when applied to the circumstances of this case, in my opinion, supports the opposite view entirely from that for which he cited it. "The general rule is," said his Lordship in that case, "that when you cannot sever the legal from the illegal part of the covenant, the contract is altogether void; but when you can sever them, whether the illegality is created by Statute or by Common Law, you may reject the bad part, and retain the good." Here we cannot sever them; the good and the bad being indissolubly united by one entire consideration covering both.

I think that the questions which present themselves for our consideration, under this bill, are not, as stated by the learned Judge in Equity, whether the Grand Southern Railway Co., at the time of the execution of the indenture set out in it, was extinct or not, or whether or not that indenture is absolutely void.

In my opinion the question for our consideration would be more accurately stated, as, (1). Whether the Grand Southern Railway Company at the time of the execution by them of the indenture set out in the bill, had power under its Acts of incorporation to execute such an instrument; providing as it does, for the prosecution of the works, under their charter, and the construction and completion of their unfinished railroad.

¹ Ambler, 740.

² 1 Sch. & L. 52, 55.

³ L. R. 3 C. P. 285.

Or, (2). Whether there are reasonable grounds for contending that it had not such power. Or, (3). Whether the agreement contained in that indenture is one of such a class as the Court has jurisdiction, or has been accustomed to decree specific performance of.

Before discussing these questions, it will be convenient for me to refer, briefly, to the Acts under which the Grand Southern Railway Company has been incorporated and to collect from the affidavits in the case on appeal the facts, so far as necessary, for their discussion.

The Grand Southern Railway Company was originally incorporated by 35 Vict., c. 27, for the purpose of constructing a railroad from the city of St. John to the town of St. Stephen. Its capital stock was to consist of at least two millions of dollars; and power was given the company to increase the stock, if necessary, to three millions. The fifth section of that Act restricted the liability of the stockholders to the amount of stock which they should hold. The eighth section authorized them to raise money upon their bonds and debentures, and to mortgage the road and its branches to secure the re-payment thereof. By the first section, the payment of the \$50,000 into the treasury of the company, was made a condition precedent to its going into operation; and by the twelfth section, it was enacted that "to entitle the said corporation to the privileges of this charter, the construction of the said road shall be commenced within three years, and shall be *bona fide* continued from year to year, so that the whole be completed within eight years from the passing of this Act."

This Act was passed on the 11th April, 1872; but so far as appears, nothing was done under it; no steps were taken towards getting the stock subscribed, or the charter accepted, and no money was paid in, until after April, 1874, when another Act, the 37 Vict., c. 85, was passed in amendment thereof. The protection afforded to the public, by the original charter was small enough indeed; but the 37 Vict., c. 85, passed in April, 1874, swept away every vestige of even this. Payment of even the small sum of \$50,000 was no longer required to be made before commencing operations. Although the liability of the stockholders remained limited to the amount of the stock

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which they held; even the minimum amount of stock which the original charter stipulated for—two millions of dollars—was no longer required to be subscribed; but the company was authorized to commence the construction of a railroad some twenty miles in length, without a dollar in its treasury, so soon as \$20,000 of stock should be subscribed for. By the 35 Vict., c. 27, the company was empowered to borrow money on the security of the railroad and its branches. The 37 Vict., c. 85, sec. 4, empowers the Directors to “subject and charge,” not only the railroad, but “the future lands, goods, other property and effects, tolls, income and profits whatsoever of the said company, etc., etc., and to grant and assure the whole or any part of any guarantee of interest, grant of money or lands, or other benefit, profit, or advantage, already or hereafter to be granted, conceded, or allowed to railroad companies in this Province.” The time for commencing the construction of the road was extended by the 37 Vict., c. 85; but the time for its completion remained as before, and would expire on the 11th of April, 1880. Notwithstanding all these facilities, the Grand Southern does not appear to have got under way until some time after the 37 Vict., c. 85, was passed.

On the 20th January, 1876, that company entered into an agreement with her Majesty to connect the lines of railway mentioned in their charter, and undertook to commence work under it on or before the 31st day of December, nearly twelve months after its date, and to complete these lines on or before the 11th April, 1880, so as to be then used for the conveyance and carriage of passengers, goods and chattels thereon. When the work, under that agreement actually commenced, does not anywhere appear in the case on appeal.

The respondent, Greene, in his affidavit, sworn on 28th June, 1880, states that the other respondents, by and with the sanction and approval of the Government of this Province, entered into a contract with him on the 16th May, 1876, to construct and complete the said Grand Southern Railway from St. Stephen to St. John; and by the terms of the said contract the subsidy that was to be paid by the said Government to the said company to assist in building the said railway, was assigned to him.

It would have been more satisfactory if Mr. Greene had annexed a copy of his agreement with the company to his affidavit, so that the Court could understand its terms. But at all events we have it alleged in the second section of the bill, that Mr. Greene was to complete the railway from St. Stephen to St. John, "in accordance with the Acts of Assembly," which would import that it was to be finished, on or before the 11th April, 1880.

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By the 7th clause of the agreement between the company and the Government, already referred to, the former agreed, "*bona fide* to commence, on or before the 30th December, 1876, the work of construction of the said line of railway, and to proceed with the same with all reasonable despatch, so as to have the same completed on or before the 11th day of April, which will be in the year, 1880, with power to the Lieutenant Governor in Council, by notice in writing to the said company, should they fail to make reasonable progress with the said work, to terminate the contract at the end of six calendar months from the service of such notice, unless the company give satisfactory proof to the Governor in Council that the work is proceeding, or likely to proceed, so as to be completed within the time aforesaid."

On the 2nd December, 1878, an order in Council was passed, directing notice to be given to the Grand Southern Railway Company, under the 7th clause in their agreement, to determine that agreement in six months after such notice, unless satisfactory proof should be given to the Governor in Council, as therein provided for. On the same day a notice was prepared by the Provincial Secretary, in pursuance of such order in Council, for service on the Grand Southern; and service of such notice is acknowledged by the Company's Secretary, on 14th January, 1879.

Copies of the agreement of 20th January, 1876, between the Company, and Her Majesty, taken from the Journals of the House of Assembly; and of the Order in Council of 2nd Dec., 1878, of the notice of the same date, and the acknowledgment of its receipt by the Secretary of the Company, taken from the same source, are annexed to the affidavit of Mr. J. Murray Kay, sworn on 7th July, 1880. And, in connection with the pro-

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duction of these papers Mr. Kay swore, that, until very recently, little or no work had been done on the Grand Southern Railway for over two years, and that he believed the company was worthless in every way.

Mr. Greene, in an affidavit in reply, sworn on 10th July, 1880, whilst he does not deny Mr. Kay's statements that the company was worthless, and that the work on the road had been at a stand-still for two years, stated that before the agreement between the company and Her Majesty, of date 20th January, 1876, was executed, the Grand Southern Railway Company gave to the Governor in Council satisfactory evidence of their ability to construct, finish, and equip, the line of railway, which, by that agreement they undertook to construct; and that the Governor in Council upon such evidence, waived the notice given under the order in Council of 2nd Dec., 1878.

I wish to be distinctly understood as repudiating the idea of imputing to Mr. Greene any intentional mis-statement, but unless he is himself the Grand Southern Railway, I am at a loss to understand how he can make such a positive statement as to the satisfactory character of the evidence furnished by it, to the Governor in Council, of its ability to construct and equip the railroad. And, more especially, in view of the undisputed facts about to be referred to, that all the property of the company, whether then existing, or thereafter to be acquired, had been transferred to trustees for the benefit of the bondholders; that the total amount of its subscribed stock never exceeded about \$24,000, of which only about \$1240 had been actually paid. It was not until after the company should have made default—under the agreement of 20th January, 1876—should have failed to make reasonable progress with their work under it, that an Order in council was authorized to be made, and a notice given to determine that agreement. And it passes my understanding how any proof, however satisfactory, given not only before any default had been made, but before even the agreement itself had been executed, could furnish grounds for a waiver by the Governor in Council of a notice, given in pursuance of an Order in council, under the seventh clause of it nearly two years afterwards.

At all events the company did not complete the construction

of the railroad before the 11th April, 1880, in pursuance of their contract, and in accordance with the provisions of their charter. And early in the Spring of that year, the Provincial Legislature being then in session, the company applied to it for an Act to amend its charter by extending the time for the completion of the road, and the Legislature refused to pass such an Act. What took place on that application is detailed in the affidavits of Mr. Howard D. McLeod, Mr. Murray Kay, and Mr. F. E. Barker. The statement of the latter being more circumstantial than any of the others, I give it verbatim.

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"Application," [Mr. Barker says,] "was made to the Legislature at its last Session, by and on behalf of the plaintiffs, for the passage of an Act extending the time for the construction of their road, which time was then about to expire; that the Legislature refused to pass such an Act after evidence had been given before a committee of the House of Assembly, appointed for that purpose. Amongst others who were then examined, under oath, were Mr. Barry, the President, and Mr. Ludgate, who had been Treasurer of the plaintiffs' company. And it was on that occasion sworn to by them, or one of them, that only about \$24,000 of the capital stock of the plaintiff's company had been subscribed, and of that only a small percentage, amounting I think on the whole subscribed stock to \$1240, had been paid in. It also appeared by the evidence given under oath by the speaker of the house, Mr. Stevenson, before the same committee, that he was a trustee for the bondholders, and that all the property existing and to be acquired, together with the right to any government subsidy, had been assigned to the said Stevenson and another. I have no doubt, whatever, that the Directors who executed the said lease set out in the bill, were well aware that the Legislature had refused to extend the time fixed for the completion of the road; and also that the plaintiff company was practically worthless, so far as any pecuniary responsibility is concerned."

Mr. Greene, in his affidavit in reply, makes a correction in Mr. Barker's statement to the effect that Mr. Stevenson, in his evidence before the Committee, excepted "the whole of the subsidy granted by the Government," from the property, present and future, of the company, which he and another held in trust for the bondholders. I have no doubt that Mr. Greene is correct. I see by his former affidavit, that the whole of that subsidy had been assigned to himself at the time when he entered into the agreement with the Grand Southern to construct the road for them. With the exception of that correction, the whole of Mr. Barker's statement remains uncontradicted, as well with

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regard to the conduct of the Directors of the Carleton Branch Railroad, as also in relation to the financial standing of the Grand Southern Railway Company.

Returning now to the discussion of the question arising out of this Appeal, as I have said, the first question for us to consider is, not whether the Grand Southern Railway Company is extinct, or had ceased to exist on 11th April, 1880. It certainly did not. By the Consol. Statutes, c. 98, section 3, its existence is prolonged for three years beyond that date; but only "for the purpose of prosecuting or defending suits by or against them; and of enabling them to settle and close their concerns, to dispose of, and convey their property, and to divide their capital stock."

Nor is it necessary for us to hold, as Mr. Skinner contended it was, that the language of 35 Vict., chap. 27, sect. 12, is sufficient to create a forfeiture of the charter. A contract may be *ultra vires*, and yet the charter may not be forfeited. In *In re The Albert Mining Co.*,¹ this Court held that proceedings by *quo warranto* were inapplicable to the cases of private corporations.

And in *The Attorney General v. Great Eastern Railway Co.*,² Lord Justice James recognized the possibility of an agreement being theoretically *ultra vires*, although the Attorney General would have no right to interfere on behalf of the public, His Lordship said:

"So far as the first" (a company incorporated by special Act of Parliament for the purpose of making and working a railway) "has compulsory powers, it must not abuse them; so far as it has statutory duties it cannot delegate them; so far as it is under any statutory prohibition, or direction, it must not violate the one or neglect the other. But even in these cases, it is only when some public mischief is done, or where, in respect of something intended for the public protection, there is misfeasance or nonfeasance, that the Attorney General ought to interfere. If a particular land-owner has cause of complaint, it is for him to appeal to the tribunals. If as between the company and its shareholders there is a wrongful application of the capital, or a wrongful incurring of liabilities, it is for the shareholders to complain; if as between the company and any persons outside the company it is entering into contracts *ultra vires*, it is for such persons to take proper advice, and guard themselves from risks which they are free to avoid. I cannot myself see any principle on which the Attorney General is to interfere with a railway company's contracts, because

¹ 2 Puga. 22.

² 11 Chan. D. 449, 484.

they are *ultra vires*, any more than he would, on the like ground interfere with the contracts of any other incorporated joint stock company, carrying on any other industrial enterprise." See *Ashbury Railway Carriage and Iron Company v. Riche*.¹

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Our first inquiry then, must be, whether or not, on the 30th April, 1880, the date of the agreement which we are asked to confirm and declare to be obligatory, the Grand Southern Railway had power under their charter to enter into an agreement with a view, and for the purpose of completing the construction of their still unfinished road. Although there are no express prohibitory words in the 12th sect. (35 Vic., c. 27), is it not a necessary inference from the language of that section that the Legislature did not intend a contract for such a purpose to be entered into by the Grand Southern Railway Company, after the lapse of eight years from the date of passing its Act of Incorporation? That period of time would expire on the 10th April, 1880. And I think that the Legislature has expressed its intention to that effect, in plain and unambiguous language, when it provides that, to entitle the company to enjoy the privileges of their charter "the whole railroad must be completed within eight years from the passing of the Act." If so, a contract such as this, entered into by the company, after the expiration of that time, and providing for the subsequent completion of the road, must be *ultra vires*, and void. And we are asked to declare such a contract to be obligatory, directly in the face of the language of the Act of the Legislature. *Vide Shrewsbury & Birmingham Ry. Co., v. The North Western Ry. Co.*² And see also *Ashbury Carriage and Iron Co. v. Riche*. And per Lord Blackburn, in the latter case, in the Exch. Ch.³ "I do not entertain any doubt that, if on the true construction of a Statute creating a corporation, it appears to be the intention of the Legislature, express or implied, that the corporation shall not enter into any particular contract, every Court, whether of Law or Equity, is bound to treat a contract entered into contrary to the enactment, as illegal, and therefore wholly void."

If it is competent for any Court to pronounce a contract for the completion of the Grand Southern Railroad to be valid

¹L. R. 7 H. L. 658, 672.²6 H. L. Cas. 113, 137.³L. R. 9 Exch. 224, 262.

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and obligatory, although not entered into until twenty days after the time expressly limited in its charter for that work to be done; it would be equally competent for such Court to affirm a similar contract entered into twenty years afterwards; and the object of the Legislature in placing such a restriction upon the enjoyment of its franchise by the company, would be entirely defeated.

Furthermore, the question of *ultra vires* does not arise between the directors of the Grand Southern and its shareholders, but between that company and another; and depends upon the incapacity of the company itself to enter into the agreement under consideration, at the time when it did, and manifests itself upon the Act of Incorporation, that Act is a public Statute—a part of the public law of the land—and every one dealing with the company must take notice of its provisions. The cases of *The Royal British Bank v. Turquand*;¹ same case in Exch. Ch.;² and *Agar v. The Life Assurance Society*;³ which were cited by Mr. Weldon, do not apply.

Neither does the case of *The Midland Railway Co. v. The Great Western Railway Co.*,⁴ because in that case, the Court was of opinion that the agreement in question, “without any doubt whatever,” was not illegal.

It is scarcely necessary to say that the powers of the company must be limited and circumscribed by the terms of the Act of Incorporation, and that cannot in any way be extended or affected by the report of a committee of the House of Assembly, or by the Act of the Governor in Council in extending the time allowed the company for the completion of its contract. Only an Act of the Legislature can restore to the Grand Southern Railway Company the powers and privileges which that Legislature has declared that it is no longer entitled to enjoy. Upon this point the observations of Lord Justice Baggallay, in *The Attorney General v. The Great Eastern Railway Co.*,⁵ are deserving of notice.

Being of opinion that the indenture set out in the bill, and which is alleged to have been entered into on 30th April, was, at that time clearly *ultra vires* the authority which had been

¹ 5 El. & Bl. 248.

² 6 El. & Bl. 327.

³ 3 C. B. N. S. 725.

⁴ L. R. 8 Chan. 841, 857.

⁵ 11 Ch. D. 480, 490.

conferred upon the Grand Southern Railway Company by its charter, the second question is practically disposed of, as well as the first. And it is unnecessary to occupy time in the discussion of the third.

If I have arrived at a correct conclusion upon the first point, it is of no importance whether the agreement belongs to a class over which the Court has jurisdiction to decree specific performance or not. The agreement being *ultra vires*, there is no Equity left to sustain the injunction.

But I have no hesitation in saying that this is not such an agreement as a Court of Equity, in the exercise of its jurisdiction to decree specific performance, would attempt to enforce; and I refer to the following cases, as authorities upon the point: *Clarke v. Price*; ¹ *Gervais v. Edwards*; ² *The South Wales Ry. Co. v. Wythes*; ³ *Merchants' Trading Co. v. Banner*.⁴

And having regard to the financial standing of the Grand Southern Railway Co., I think we should say with Lord Justice Knight Bruce, whose dictum is quoted and approved of by Lord Cranworth in *The Shrewsbury & Birmingham Ry. Co. v. The North Western Ry. Co.*,⁵ "the contract, whether legally valid or invalid, is one which a Court of Equity ought not to be active in enforcing."

For these reasons I am of opinion that the injunction order made by the learned Judge in Equity should be dismissed with costs.

WELDON, J. It is necessary to bear in mind the position of the two parties, the Railway Companies. The Carleton Branch Company, the appellants, owned a short railway running from deep water of Saint John harbor to Fairville, having no rolling stock, for the purpose of connecting with the Western Extension, now the Saint John and Maine Railway. The respondents' railway, incorporated a few years later, run to the appellants' railway, about a third of the distance from Fairville to the harbour. I am unable to discover from their charter that the appellants cannot lease the right to run on the road to the respondents, and the other company, the Saint John and Maine. They, of course mutually undertaking to so run as not to interfere with each other.

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¹2 Wils. Ch. 157.
²2 Dr. & War. 80.
³5 DeG. M. & G. 880.

⁴L. R. 12 Eq. 18.
⁵6 H. L. Cas. 113.

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The respondents applied to the appellants to obtain the right to connect their road with the Carleton Branch Road, and run over the same to deep water. After negotiation, an indenture of lease was entered into between the said parties—the lease was duly signed by the president, and three directors of the appellants' company as provided by their Act of incorporation. The 5th section of their Act gives them ample and full power to connect with other roads. And the 17th section in very strong and express language confers on the directors the power to execute deeds. It declares—

“Every deed so executed shall have as full effect, and be as binding and conclusive on the company, and the directors of the company as if the terms and provisions of such deed were by this Act of Assembly expressly enacted and made binding and conclusive accordingly.”

I can hardly conceive the Legislature could have used stronger language to confer power on the directors.

The respondents are a company incorporated by an Act of the General Assembly, with certain compulsory powers, and they were to build the road within a certain period; they had not done this when the lease was made. They are a corporation that exists until it is dissolved; their compulsory powers to take land may be gone, but that, I am inclined to think, would not prevent them accepting a lease for the benefit of their company. I am unable to arrive at a conclusion that the appellants can raise that objection to defeat their own contract until the respondents fail to carry out their obligations for the benefits conferred.

The Bill in this case was filed to prevent the appellants from obstructing the respondents uniting and forming a junction of their lines with the track of the appellants, and also from interfering with, or in any manner hindering the plaintiffs below, (respondents here,) from passing with their locomotives from the junction, over the appellants' road to deep water, as referred to in the lease of the appellants, dated 30th April, 1880.

I am asked to decide whether the lease of the appellants is *ultra vires*, and whether the lease and all its provisions should be enforced. I do not think the learned Judge in Equity has so decided. I cannot, therefore, concur with the judgment of Mr. Justice Duff. I think that is not the question before us to adjudicate upon; but whether the injunction order is right in

keeping matters in such a state, that the respondents shall not be interrupted in joining their line with the appellants' and running to deep water. The learned Judge in Equity has carefully guarded the rights of the appellants, by providing that the respondents, who, it is alleged, are of doubtful ability to answer in damages for their acts, shall give a bond to the appellants conditioned for the payment of any damages they may incur. The interim order contains the following condition :

"The plaintiffs shall procure a bond to be given by a responsible party in the penal sum of \$5000, conditioned that if it should be finally determined in this suit that the Grand Southern Railway have no right to do the acts which the defendants are to be enjoined from preventing them doing, they will pay to the defendants all damages that may be occasioned to them by such acts. Such damages to be assessed by this Court."

The question of costs was reserved by the learned Judge in Equity, until he finally heard the cause. In the meantime matters were to go on under the agreement, the Grand Southern Railway joining the Carleton Branch Railway's line, and running to deep water.

It appears to me that it was unnecessary to go into the case as to the lease being *ultra vires*, or into its merits, or whether it is valid or invalid. The Judge below has not heard the case on its merits, and therefore this Court, being the appellant Court, ought not to anticipate what judgment might be given by the Judge in Equity. There is much to be considered. The lease in question provides that in case of differences arising, they may be referred to arbitration. I do not offer any opinion as to the lease ; the appellants' and respondents' counsel differing as to the powers of the directors to make such a lease as is set out in the case ; the learned Judge in Equity having the same still under consideration,—the various grounds *pro* and *con* have not yet been heard. He has only granted an interim injunction order, restraining the appellants from interrupting the respondents in running their trains over the lines to the Saint John harbour, provided security be given to make compensation in damages, in case the appellants should succeed at the hearing.

I therefore dissent from the judgment of Mr. Justice Duff,

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1882. in which the Chief Justice concurs, and I regret that we have not had the assistance of the other Judges.
 THE CABLE-TON BRANCH RAILWAY Co. I do not think this is a case for costs on either side.
 v. WETMORE and KING, JJ., not having heard the argument
 THE GRAND SOUTHERN RAILWAY Co. took no part.
 PALMER, J., was not a part of the Court of Appeal at the time the cause was argued.
 ALLEN, C. J. I agree with the judgment of Mr. Justice Duff.
Appeal allowed with costs.

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*February.**Certiorari—Judge Supreme Court—Review—New trial.*

A *certiorari* will not be granted to bring up the proceedings in review before a Judge of this Court, under the Consol. Statutes, c. 60, the proper remedy being by motion to set aside the order. (WETMORE, J., dissenting.)
 A Judge has no power to order a new trial in a review case, under Consol. Stat. c. 60, s. 43. (WELDON and PALMER, JJ., dissenting.)

An order *nisi* for a *certiorari* having been granted by Mr. Justice King, at Chambers, to bring up an order of review made by Mr. Justice Palmer, under the Consol. Statutes, c. 60, whereby he set aside a nonsuit, and ordered a new trial, in a civil case tried before the Police Magistrate of the town of Portland;

October 25th, 1881, *T. C. Allen* now shewed cause. The review was under the 43rd sect. of cap. 60 of the Consol. Stat. The first point is, whether under that section a Judge has power to order a new trial. It provides that he shall "decide the cause according to the very right of the matter." This is an authority to make any order necessary to do justice between the parties. Many cases might be suggested in which no order, but for a new trial would meet the justice of the case. For example: suppose a plaintiff offered proper evidence to prove his case, and the Justice refused to receive it, and ordered a nonsuit, what order could a Judge make on review that would do justice between the parties except an order for a new trial. A verdict could not be entered for the plaintiff because the evidence tendered might have failed to prove his case, or the defendant might have had a good answer; and for obvious reasons a verdict could not be entered for the defendant. [DUFF,

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J. Must the Judge not decide the case, and in the manner pointed out by the Act, that is, by affirming, reversing, or altering the judgment? Is granting a new trial deciding the case? Yes, it is a decision of the question before the Judge, which was, whether the Justice was right in entering a nonsuit. The Judge is bound to decide the case according to the very right of the matter. An order for a new trial is the only way to accomplish that end; he therefore has authority to make that order by necessary implication.

2. Assuming the Judge had no power to order a new trial, still a *certiorari* should not issue. It only lies to an Inferior Court. *Ex parte Jacob*;¹ 2 Bac., Abr. "*Certiorari*" (B.) The proceedings being before a Judge of this Court, a *certiorari* is unnecessary to bring his order before the Court. If it was wrong, the proper course was to move to set it aside. 2 Arch. Prac., (12 ed.) 1609.

3. The decision of a Judge in a review case is final. *Ex parte Richards*.²

George F. Gregory, contra. The Judge had no power to order a new trial under section 43. The jurisdiction being statutory must be strictly pursued. On the order being made, the cause is to be remitted to the Justice that he may issue an execution for the amount awarded to either party. This precludes the idea of a new trial; it shews that the intention was to have the cause finally disposed of by the reviewing judge. If it had been intended to give the Judge power to order a new trial, some machinery would have been provided for carrying out his order. The Judge cannot make a practice by his order, by which the Justice can get the parties before him to try the matter over again. The Act provides no means of doing it. The words, "And after such hearing, the Judge shall decide the cause according to the very right of the matter, without regard to forms," &c., when read with the remainder of the section, merely mean that the Judge shall not be hampered with technicalities in making any of the orders that he is authorized to make.

2. A Judge of this Court hearing a review, is not acting as a delegate of the Court; and therefore there is no appeal from

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his order. He is exercising an inferior jurisdiction, and *certiorari* is the proper remedy. The proceedings on review are not in this Court. *Regina v. McIntosh*.¹

3. I admit that the Court will not grant a *certiorari* to bring up proceedings on review, except under special circumstances; but the case of *Ex parte Richards*,² shews that there are cases in which the writ will be granted. And where, as in this case, a Judge makes an order which he had no jurisdiction to make, the *certiorari* should go.

Cur. adv. vult.

The Court now delivered the following judgments:

PALMER, J. This is an application for a *certiorari*, to be addressed to myself, as one of the Judges of this Court to remove proceedings had before me, acting as one of the said Judges, on review from the judgment of the Portland civil court, in a case in which the said court had entered a judgment of nonsuit, which I ordered to be set aside, and a new trial granted. I think such a proceeding as is here asked for,—that is for this Court to issue a writ of *certiorari* to compel one of its own Justices to certify unto this Court proceedings had before him as such Justice,—is wholly unnecessary and without warrant of law, and unheard of in practice. The power under which I and every other Justice of this Court am authorized and compellable to hear this matter of review, was conferred on each of the Justices of this Court, and not on any one individually. Therefore it is a proceeding before a Justice of this Court, *qua* such Justice; and from his decision it is clear there is an appeal to this Court itself, as of course, *ex debito justitiæ*, unless the law has declared the decision of such Judge final and conclusive; and if that were done, it would equally prevent a *certiorari* issuing as an appeal. See 2 Arch. Prac., 1609; *Shortridge v. Young*;³ *Teggin v. Langford*;⁴ *Fowler v. Churchill*;⁵ *Brown v. Bamford*.⁶ In the case of *Brown v. Bamford*, the Court of Exchequer decided that even where the Court had no original jurisdiction over the matter in which a Judge had made an order, the statute having given such jurisdiction to a Judge, only the Court would set the order aside, because the statute had given

¹1 Han. 372.

²2 Fuga. 6.

³13 M. & W. 5.

⁴2 Dowl. N. B. 467.

⁵2 Dowl. N. B. 562.

⁶8 M. & W. 44.

the power to the Judge as a Judge of the Court: and in *Morris v. Manesty*,¹ the Judge having made an order at *Nisi Prius*, professing to act under a statute that gave power to a Judge to make an order as Judge, but gave the Court no power, the Court set the order aside on the ground that the statute did not authorize the particular order made. That is this case exactly, if as is contended, I have no authority to make the order for a new trial. The law is that when a Judge's order is professed to be made under a statutory power given to a Judge alone, *qua* Judge, and not to the Court, if the order exceeds his power the Court can set it aside: and according to the case of *Ex parte Woodward*,² the same course is open, whenever a Judge of this Court makes an order that the law does not authorize. In that case this Court set aside Mr. Justice Weldon's order because the Court thought he had no power to make it.

It follows that there is no necessity for a *certiorari*; for, 1st, These proceedings being before a Justice of this Court, as such Justice, they are in the Court already, and I am bound to inform my brother Justices what they were, and they are bound judicially to notice them.

But if that were not so, there being an appeal, the issuing of the writ being discretionary, it ought not to issue. This has been already decided by this Court in *Ex parte Thomas*,³ a part of the head note of which case is as follows: "Held, as there was an appeal from the Judge's decision, a *certiorari* would not lie to remove proceedings."

These considerations are sufficient to refuse the rule, but as the point of objection to my order made on the review is, that a Judge hearing a cause on review, under chap. 60, Consol. Stat., sec. 43, cannot order a new trial, and it is important to have the point decided, so that the practice may be uniform, I will proceed to give my views on that point.

The question depends upon the following enactment in the section referred to: "Upon these," (the Justice's copy of the proceedings,) "being laid before a Judge of the Supreme Court, with an affidavit, etc., the Judge shall hear the matter, etc., and shall after such hearing decide the cause according to the very right of the matter, and may affirm or reverse or alter the same

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in any respect, and remit the cause to the Justice, that he may issue execution for the amount awarded to either party and affirmed on review, or enforce payment of such amount with costs by attachment."

The power given to the Judge by this statute is to review the proceedings before the Justice, and decide the cause according to the very right of the matter without regard to forms; I think the power of the Judge, as conferred by this statute, is sought to be limited to the mere directions given therein, losing sight of the fundamental canon of construction, that where a statute gives power to do any act, it by necessary implication gives power to do everything that is reasonably necessary to carry out such power.

How can a Judge review and decide according to the very right of the matter, unless he can correct and enforce such right. The power here granted must mean that he is to order what is right to be done; and if this is so, that power is only limited by what is right, or, in other words, giving to both parties any legal rights they may have been deprived of in the court below, and no more or different from this. If this is correct, how is it possible for a Judge, in the case before put, to do otherwise than set aside the proceedings before the Justice; from the wrong done, rectify that wrong, and decide that he should proceed in the case according to law; or, as the statute expresses it, according to the very right of the matter? But it has been suggested that, as these words are followed in the statute by the words "without regard to form," this renders the direction that the Judge should decide according to the very right of the matter, nugatory. I quite agree that these words were unnecessary; if it were not, that the Legislature intended to prevent mere form interfering with the Judge deciding any way that law and right demanded, as the power to review would, by implication, give ample power for that purpose, and, therefore, when the statute declared "that he was to decide according to the very right of the matter, without regarding form," all the effect was, that he was not to be prevented from doing right because of mere form. But, if I could for a moment think that the word review did not give such power, then I confess myself unable to understand how, when the Legislature has

said that the Judge is to decide according to the very right of the matter, he is any the less directed to do this because he is directed not to be prevented from doing it by mere form.

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Suppose a plaintiff, under this chapter, brought an action on a promissory note, properly brought it on for trial, and produced his note at the trial, and offered to prove the defendant's signature by proper evidence, and the Justice rejected such evidence, and the jury gave a verdict against the plaintiff by the Justice's direction, and the case comes before a Judge of the Supreme Court on review, what is he to do? The statute says he shall decide the cause according to the very right of the matter, and he cannot himself receive nor hear the evidence, and consequently it is impossible for him to order a judgment to be entered for the plaintiff, for there is no proof of his case; and even if the evidence was admitted, he cannot tell until the evidence is given, whether it would prove the case or not. Under such circumstances, I think he is bound to decide the cause, (which, in my opinion, means the matter before him), according to the very right of that matter; in other words, according to law. Such right surely would be that the plaintiff's evidence would be decided to be admissible, and all proceedings founded upon its erroneous rejection annulled, and each party ought to have his cause tried out according to law. This is the judgment the plain words of the statute says he must give. If this is the very right of the matter,—and I think it so demonstrated,—as soon as it is shewn that no other decision could be given without violating the legal rights of either one party or the other. Then having decided thus, what does the statute say he is to do? Why it distinctly declares he is to alter the judgment of the Justice in any respect accordingly; that is to make it in accordance with his own decision, as to what the very right of the matter is; in other words, in the case supposed, reverse the Justice's decision rejecting the evidence, ordering it to be admitted, setting aside the final judgment, and order the trial to proceed according to law.

I think this would be the effect of the statute, even if it only authorized the Judge to review the proceedings, which this statute clearly does, and there is no attempt in it to limit the power of the Judge on review. It enacts that he

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may do certain things, such as finally deciding the case where sufficient material is before him; but it is no where declared in the statute that he must do so. To rightly understand this matter, what is meant by review must be discussed. I think it is clear that the legal meaning of "review" is merely an examination of matter apparent upon the face of the proceedings reviewed themselves, and determining whether or not there is any error apparent therein, and exercising the power of correcting such error. The rules are well laid down by Lord Chancellor Eldon, in *Perry v. Phelps*.¹ On review nothing can be dealt with except error apparent in the proceedings. It follows that when a statute authorizes a review merely by any tribunal, such tribunal cannot hear new evidence nor proceed on new material, and also that such tribunal would have power to effectually correct and remedy, according to the course of the common law, the effects of any such apparent error. And it also follows that, when the proceedings in any cause reviewed in which an erroneous decision was made, and the cause decided before both parties had been fully heard, the only order that a reviewing tribunal could make is that the cause be reheard, and if the court of review has not power itself to rehear it, it ought and must go back to the proper court, and be reheard, and this is the usual, proper, and only course that has ever been pursued.

On appeal it is different; an appellate court has power to re-try the case, and this is what is done in the Justices' cases in Nova Scotia, and also in the County Courts throughout Canada on appeals from summary convictions. Our statute authorizing a review merely, the Judge reviewing never has, so far as I know attempted to exercise the power to hear any matter that was not before the Justice, except where the statute directed him to do so; and, in my opinion, he has no authority to do so; consequently when, on review, it appears to be right that the cause should be reheard, the common law authorizes the proper tribunal to do so; and a statute that authorizes a review, which I have shewn authorizes the correction and remedy, necessarily authorized the Court of review to order the rehearing by the proper tribunal, for that is the correction,

and the only way the error can be corrected. This, I think, would be clear, if there were no directions in the statute whatever, only authority to review: but the Judge is directed by the statute to alter the judgment rejecting the evidence below, and to so alter it, according to the very right of the matter. This, I think, must mean that he must alter it so as not to work the most manifest injustice, or lead to an absurdity; and the Court ought not to hold that the Legislature so intended, if the words they have used can be construed to avoid such meaning. But, it is said, this statute intends to abridge this power, for the words are, that the Judge is to decide *the cause*, meaning the whole cause of action in the Court below. I think, however, this is not what these words mean. The cause before the Judge is what is in controversy. Thus, in the case supposed, it would be, whether or not the Justice erred in rejecting the plaintiff's evidence and giving judgment against him, which the plaintiff must get rid of, before he can get any redress in any Court; and there is no cause before the Judge, in which the plaintiff can claim the proper trial of his case there; the Judge, in fact, having no jurisdiction over such a cause. Therefore when the matter or the cause before the Judge is mentioned, it can in no sense mean the whole cause before the Court below, but only such as can come in contest before the Judge. Suppose the same thing had taken place before a Judge of the County Court, all this Court could do on appeal, would be to set aside the judgment, and order the cause to proceed in the Court below; and yet we would decide the cause before us, and according to the very right of the matter. In that case it would be quite right to say that this Court had decided the cause before it. But, it is argued, because the statute enacts that the Judge may affirm, etc., and remit the cause to the Justice that he may issue execution for the amount awarded to either party, and affirmed on review, that no other order to remit can be made. But, it is apparent that, if the Judge orders the payment of another sum of money than what the Justice's judgment did, the Justice would have no power to issue execution for it, without statutory authority, and this power is put in the statute, and is confined to cases in which the Judge could award an amount to one party or the other:

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but it has no application to this case, in which the Judge cannot determine the whole case for want of material, and in which all that is required is to have the judgment and proceedings so altered that they are set aside from the mistake, and that the Justice should further hear the case, and admit the evidence and finally render judgment according to what is properly brought before him. I confess myself totally unable to understand how a direction authorizing the Justice to issue an execution for the amount of a judgment given by a Judge, at all affects an order of a Judge annulling other illegal proceedings on review, when he can order no amount to be paid.

The section enacts that a copy of the Judge's minutes of the judgment on review, shall, etc. This shews that the cause before the Judge is a review, (i. e., a review of the proceedings before the Justice), and if the Judge is authorized to review, this authorizes him to correct all errors in what is reviewed. This is the legal meaning of review in all Courts, and in no other way is it possible to correct the error in this case otherwise than it has been done; and for a Judge to confess himself unable to do this is to admit that he has no power to correct the error, or in still more correct language, no power to review. I understand that some of my brethren think that a Judge could order a nonsuit, and thus enable the plaintiff to bring another action; but to my mind there are several conclusive objections to that course. The first is, that such a judgment is not the plaintiff's right, or right in any sense. In the second place, it was the judgment entered in the Court below, of which the plaintiff most righteously complained; therefore if I had ordered a nonsuit, it would be an affirmance of the judgment of the Court below, and in the plain terms of the statute I would have been compelled to award the costs of the review to the defendant the successful party, and thus compel the plaintiff most unjustly to pay all those costs when he has been right and the defendant wrong; and to say that this is the effect of the words of a statute which directs that I am to give judgment according to the very right of the matter, would, I confess appear to me very absurd and ridiculous, if it were not that a majority of my brethren, for whose opinions I have a most sincere respect, appear to think otherwise. Some others have said

I ought to have reversed the judgment of nonsuit. This in my opinion is just what I have done. How can any more be done without another trial. I cannot give judgment against the defendant. His case has not been heard, and I cannot hear it. I think I should make any order in this matter that the majority of the Court think should be made, without regard to my own opinion; but I confess myself unable to draw an order to meet the views of the majority of the Court, if that is, a Judge can make no order except something that is specially directed by the words of the statute. Again, it is said that an order setting aside the proceedings, and allowing the Justice to proceed with the trial is erroneous, because I had no power to make a practice for the Justice's Court, and the Act does not provide machinery for the Justice to get the parties before him again. In my opinion this view is without the slightest foundation in law or common sense. It may be admitted that a Judge of the Supreme Court is not given power to regulate the practice in a Justice's Court; but if the power to review does, as I have shewn, authorize such Judge to annul all the illegal proceedings in the Court below, by setting them aside, then the verdict or judgment would be gone, and the case stand in the Court below just as if the Justice had stopped at the point at which he made the error, and adjourned the Court without fixing any time for further proceedings. In such a case will it be pretended that any Court cannot proceed in the case at any future time. Of course by a fundamental rule of the common law, notice must be given to both parties: surely the party who wished to proceed could get an appointment for the further hearing, give notice to the opposite party when it would be the duty of the Court to proceed. This power must be inherent in all Courts, as without it, the greatest injustice might be done and the parties deprived of their rights. Suppose a justice be taken sick, or suddenly deprived of consciousness, and the Court broken up at the same point at which this error was committed, if the course I have pointed out could not be pursued, what could be done if the action had to be brought within a limited time? For myself I can see no difficulty whatever in taking this course. The implied power to do this is just as much in the Justice's Court as in any other

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Court. This is the course I have myself pursued when sitting on the Equity side of this Court. It has occurred that I have adjourned a cause partly heard to another day, and been unable to attend at the time. I afterwards appointed another day, gave the parties notice, and finished the hearing.

The section of the Consol. Statutes under discussion is a copy of a section of the Revised Statutes, which was intended for a codification of the Act 4 Wm. 4, chap. 45, and the more brief form of words used were not generally intended to alter the law; and looking at the old statute, it will be seen that under it the cause was to be reviewed before a Judge of the Supreme Court, and he is directed to give judgment in the cause as the very right of the matter may appear. It follows that he is directed to do this after hearing the parties on review, that the judgment he is so to give in the cause can only be in the matter before him. The words in the Revised and Consol. Statutes are changed to "decide the cause." A Judge can decide or give a judgment in the cause before him, without deciding everything that may be litigated in that case in some other Court. In point of fact this Court gives many decisions in many cases before the case is finally disposed of. Again, any other construction would lead to the most manifest wrong and absurdity. Take the case before supposed, a Justice illegally struck out the evidence and directs and renders a verdict and judgment against the plaintiff. If on review the Judge cannot set it aside and send it back to be properly tried, and is obliged to decide and end the whole case, he would have to enter a judgment for the defendant, for the plaintiff has proved nothing, and the Judge himself cannot receive any evidence to avoid such wrong and absurdity. I think any Court ought to adopt any possible construction that the words would in any way admit of to make the enactment square with right and reason. Pollock, C. B., in *Waugh v. Middleton*,¹ says,—

"It is by no means clear that if we laid down as a general rule that the grammatical construction of a clause shall prevail over its legal meaning, whether a more certain rule would be arrived at than that its legal meaning should prevail over its grammatical construction. In my opinion," he continues, "grammatical and philological disputes are as obscure and lead to as many doubts and contentions as any

question of law. I do not, therefore, feel sure that the rule, much as it has been commended, is on all occasions a sure and certain guide. It must, however, be conceded that where the grammatical construction is clear and manifest, that construction ought to prevail, unless there be some strong and obvious reason to the contrary; but the rule adverted to is subject to this condition, that however plain the apparent grammatical construction of a sentence may be, if it be properly clear from the contents of the same document that the apparent grammatical construction cannot be the true one, then that which upon the whole is the true meaning shall prevail in spite of a grammatical construction of a particular part of it."

And in *Ruther v. Harris*,¹ Grove, J. says,—

"It is no doubt a rule of interpretation that the grammatical construction of a sentence must be followed, but this is not to be adopted when it leads to difficulty."

And in Plowden, 465, it is laid down that—

"'The sense and reason of the law is the soul of the law.' Quia ratio legis est anima legis."

I am more inclined to take the view I have done, as I happen to know that the late lamented Judge Parker granted just such orders under the Revised Statutes and as I did in this case.

Judge Watters has done the same.

I notice that Mr. Justice Wetmore has stated that I as Judge in Equity am not one of the Judges of this Court, although I confess I do not quite know what he means; yet, as I do not think it right that I should allow any right that belongs to the office that I hold to be denied while I hold it, I shall proceed to state what I consider those rights to be, and will exercise them, and if called in question by my brother Wetmore or anybody else, it will I think be right that the question be submitted to some proper tribunal for decision, and such decision abided by, by all parties.

The whole question depends upon the statutes creating the office, and declaring its powers and duties, and as they are so plain, the best way is to set out *in extenso* all the parts of them that relate to these questions.

The first is 42 Vic. cap. 7, sections 1, 2, 3, 4, which are as follows:—

1. The Supreme Court shall, on or after the coming into force of this Act, be composed of a Chief Justice, a Judge in Equity, and four other Puisne Judges.

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2. Except as herein provided, it shall be the duty of the Judge in Equity, so far as practicable, to hold the Equity Sittings, and perform the duties and exercise the powers, authority and jurisdiction which the said Court, as "The Supreme Court in Equity," or any Judge thereof, now perform or exercise.

3. The Judge in Equity shall not be required to attend the Circuits, nor attend the business at Chambers on the Common Law side of the Court, unless the illness of a Judge or some other good excuse shall render it necessary.

4. Nothing herein contained shall be construed to limit, restrict or in any manner interfere with the powers, authority or jurisdiction which the Chief Justice or any other Judge of the Supreme Court now has in Equity matters, suits, and proceedings, or to prevent either of them from holding the Equity Sittings when from any cause it shall be necessary for a Judge other than the Judge in Equity to hold the same or to limit, restrict, or in any manner interfere with the powers, authority and jurisdiction of the Judge in Equity as a Judge of the Supreme Court.

And then the 42 Vic. cap. 8, sections 6 and 9, are as follows:

6. No Judge shall sit on the hearing of an appeal from his own decision in a suit in Equity; and when the Court is sitting in two Divisions, Equity appeals shall be heard before the Division of which the Judge whose decision is appealed against is not a member.

9. No more than five Judges shall sit for the hearing of causes during Term, except when the Court is sitting in two Divisions; provided that nothing herein contained shall be construed to require that the full Court be composed of five or any fixed number of Judges.

Then the 43 Vic. cap. 11, which is as follows:—

"That whenever the Supreme Court is sitting in two Divisions a majority of the members in each Division may sit and adjudicate upon and determine any matter or question before such Division as fully and effectually as if three Judges were present sitting in such Division; and whenever the full Court is sitting, the Judge in Equity shall not be required to sit if the other five Judges are in attendance and not disqualified from sitting by reason of interest or other cause in any cause for hearing or judgment by the full Court."

Then comes the 44 Vic. cap. 12, the first section of which is as follows:—

"From and after the end of Easter Term next, the Supreme Court shall cease to sit in two Divisions as provided in and by the Act made and passed in the 42nd year of Her Majesty's reign, intituled An Act to facilitate a transaction of business of the Supreme Court, and thenceforth the said Supreme Court at Term shall be composed of a Chief Justice, a Judge in Equity and four other Puisne Judges; provided that nothing herein contained shall be construed to require that the full Court be composed of six or any fixed number of Judges,

if any of the said Judge or Judges shall by reason of illness, interest, or any other cause be incapacitated or unable to sit for the hearing of any cause."

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And it repeals the 42 Vic. cap. 8, and the 43 Vic. cap. 11.

This is the whole law on the subject, and how the powers or the duties of my office can be disputed or misunderstood I cannot conceive.

My position is that I am a Judge of the Court, with exactly the same powers in every respect as any other Judge thereof; that I am authorized to do any act, sit in all and every Court and hear all matters that any other Judge of this Court can; that it is my duty and I am compelled to do so, except so far as the Acts of Assembly have relieved me from so doing; but they do not in any way interfere with my right to do so if I choose but give me a discretion to do so or not. This I claim to be the clear right of my office. I admit any other Judge has exactly the same rights as myself, but they, like myself, are relieved of being compelled to perform some of these duties.

This, as far as the Judge in Equity is concerned, is wholly governed by the 3rd section of 42 Vic. cap. 7 above set out.

To prove that the above are the powers and duties of the Judge in Equity, it is only necessary to quote the plain words of that Act, and chapter 8.

The first section of chapter 7 says that this Court shall be composed of a Chief Justice and Judge in Equity, and four Puisne Judges; and the Act further provides that nothing in the Act shall limit, restrict or in any manner interfere with the power, authority or jurisdiction of the Judge in Equity as a Judge of the Supreme Court, or of such powers in any of the other Judges for holding sittings in Equity.

Section 6, cap. 8, enacted that no Judge shall act on hearing of appeal from his decision in equity, and when sitting in divisions such cause shall be heard before the division in which the Judge making the decision below was not a member, shewing that the Judge making such a decision was a member of the Court, but should not sit when such a case was heard.

But then it was said that section 9 only allowed five Judges

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to sit. That is true, but they were any five, and there is nothing in it to exclude the Judge in Equity any more than any other Judge: it is simply a declaration that only five out of six competent Judges should sit at any one time, leaving the matter to be settled by the Court itself what Judges should sit, no one having any more right or higher duty to do so than another.

This was the state of the law when I accepted the office, but cap. 8 was repealed by 44 Vic. cap. 12, and that enacts that the Supreme Court at Term shall be composed of a Chief Justice, a Judge in Equity, and four Puisne Judges, etc, as above set out.

It follows that it is the right of the Judge in Equity to sit in any matter that any other Judge can sit in, and that it is his duty to do so in the Court in Term, in Equity, in Election Courts and any other matter appertaining to the office of a Judge of the Supreme Court, and he has the right to attend to the business at Chambers on the common law side or go to circuits if he choose to do so, but he is not compelled to do so; and in the same way all other Judges have the right to sit in Equity—the same right as the Judge in Equity; but they cannot be compelled to do so unless it is necessary for some other than the Judge in Equity to do so.

The above are my opinions of the respective rights and duties of the Judges of the Court, and that they are so, I think it is too clear for dispute. If, however, other persons have different views, I trust that they will be expressed and some mode will be devised by which such questions may be decided. All I wish is to preserve the rights of my office and to do my duty according to law, without offence, and those rights I will not allow any person to infringe upon if I can prevent it.

WETMORE, J. Section 43 of cap. 60 provides if either party be dissatisfied with the judgment he may within six days thereafter apply to the Justice for a copy of the evidence, a minute of the cause of action, the grounds of defence, and the result, which the Justice shall give him in three days; upon these being laid before a Judge of the Supreme Court, or a Judge of the County Court with an affidavit that he thinks substantial justice has not been done him, the Judge applied to is to

appoint a time for hearing the matter, and on the hearing he is to decide the cause according to the very right of the matter without regard to forms, unless the Justice acted without jurisdiction. The section proceeds with what the Judge can do; he may affirm, reverse, or alter the judgment in any respect, and he may remit the cause to the Justice that he may issue execution for the amount awarded to either party and affirmed on review, or enforce the payment of such amount with costs by attachment. This is a statutory jurisdiction, and the Judge applied to cannot go beyond the acts the section points out, as within his power. The power to grant a new trial is not given him.

By section 45, where the Judge is satisfied by the affidavit that the defendant has not been legally served with summons or first process in the cause, or that he has not had a fair and reasonable opportunity of appearing or defending the same before the Justice, the same may be a sufficient ground for setting aside the judgment or ordering a nonsuit to be entered, or *the Judge may make such order in the matter as to him may seem right*, notwithstanding the return of the Justice, which shall be no bar or ground for excluding evidence by affidavit either of the want of service of summons or opportunity to appear as above stated. This section gives what section 43 does not give, that is, power to the Judge to make *such order in the matter as to him may seem right*. Under section 45 in the cases embraced therein the Judge on review might well order a new trial—because the section gives him power to make such order in the matter as to him may seem right, and granting a new trial would seem a necessity where the defendant was not heard, and had not opportunity to be heard. But in section 43, the Judge is told exactly what he can do, and I do not think the Judge has any right to extend his power beyond the line the Act has limited for his field of action. Nothing is said to warrant granting a new trial; the Judge is to decide the matter himself, according to the very right of the matter as it appears before him by the return of the Justice. Until the decision of *Ex parte Welling*,¹ I was under the impression the matter on review under section

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43, or rather under a similar section in the Revised Statute (section 44, cap. 137) had to be decided upon what alone appeared in the Justice's return; since that decision, I presume affidavits in addition to the one specially provided for by section 44 can be used. But whether or no, the reviewing Judge has to decide the matter upon what is presented before him by the return, or it may be the return supplemented by additional affidavits. He must however decide upon this matter, whether the return was supplemented by affidavits or the return alone, the right of the matter must depend on these documents. No doubt ingenuity might devise a quite possible case where more substantial justice might be done in granting a new trial; but even so unless the power to order a new trial is given, it cannot be granted.

The same failure of justice might have occurred in the Courts of Common Pleas when existing. But in *Reg. v. The Justices of Northumberland*,¹ it was held the Court of Common Pleas could not grant a new trial. It may be unfortunate that the law is so, but the Judges cannot help it. The case I mentioned shews a *certiorari* will lie in a case like the present. No doubt the Court should not grant it save in an extreme or important case. If it will lie, without doubt it would go to a Judge of a County Court, and why not to a Judge of the Supreme Court; why should there be any distinction? The proceeding not being in the Supreme Court, and in this respect the Judges being of concurrent jurisdiction, one is quite equal to the other. If it was a case depending in the Supreme Court before a Judge thereof, very likely a *certiorari* would not lie; but it is not a proceeding in the Supreme Court as decided in *Regina v. McIntosh*,² where Ritchie, C. J., in delivering the considered judgment of the Court says, "Even if the order for review is granted by a Judge of the Supreme Court, it is not a proceeding in that Court but a statutory power given to the Judge quite independent of the Court," with which I entirely agree.

Previous to repeal of cap. 7 and 8 of 42 Vic., (Acts 1879) and cap. 11 of 43 Vic. there might have been serious inconvenience if a *certiorari* would not issue to remove review proceedings had before

¹ Chip. MS p. 6.² 1 Han. 572.

a Judge of the Supreme Court. Take a review case before the Equity Judge, which this case was: by cap. 8 of 42 Vic., section 1, two divisions were established, in one of which the Equity Judge was to sit. This, I was under the impression was the only Common Law Court the Equity Judge was expected to sit in, at all events when the other Judges were prepared to sit. By cap. 11 of 43 Vic., (Acts 1880), whenever the full Court is sitting the Judge in Equity shall not be required to sit if the other five Judges are in attendance, and not disqualified from sitting by reason of interest or other cause, in any cause for hearing or judgment by the full Court. How would the proceedings in such a case have been got into the Court? The Equity Judge could not very well report the case to the Supreme Court unless he was on the Bench, and if he was only required to sit when the Court sat in Divisions the case could only be reported by the Equity Judge to the particular Division in which he was sitting, and not to the full Bench if the other five Judges were in attendance. I am not aware that a motion for rule *nisi* for *certiorari* could be made to one of the Divisions. Cases on the motion paper could be assigned to a particular Division, but a motion for *certiorari*, I think, required to be made to the full Court. It certainly would be very inconvenient if a party wishing to have his case heard before the full Court had to wait until one of the five Judges happened to retire from the Bench so that the Equity Judge could take his seat and report the case to the Court, and still more inconvenient for the Equity Judge to wait his chance to take a seat.

WELDON, J. This is an application for a *certiorari* to bring up an order made by Mr. Justice Palmer on a review of a cause tried before the Police Magistrate for the Town of Portland.

The question in this case is, whether the decision of Mr. Justice Palmer can be reviewed in this Court on a *certiorari*.

By cap. 57, Consol. Statutes, entitled "Town of Portland Civil Court," section 9, it is provided—

"The same right and procedure of review shall be had and allowed in all suits tried in the said Court, as is provided in and by the chapter relating to Justices in Civil Courts."

Cap. 60 Consol. Statutes entitled "Justices' Civil Courts," directs what steps shall be taken to have the judgment of a

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Justice reviewed before a Judge of the Supreme Court or a Judge of the County Court—and the power of the Judge to decide, and his conclusion is final. The review is statutory and there is nothing in the Act which authorizes an appeal from his decision—the Statute directs the Judge after hearing the parties, to decide the cause according to the very right of the matter without regard to forms, unless the Justice acted wholly without jurisdiction, and he may affirm or reverse the judgment, or alter the same in any respect and remit the cause to the Justice that he may issue execution, &c., and if the judgment be wholly affirmed or reversed, costs shall be awarded, but if in part only, costs—in his discretion—to be recovered by attachment; a copy of the Judge's minutes of the judgment upon such review certified under his hand shall be evidence of such judgment, and a copy of any order made by him shall be evidence of such order in all Courts—and the party entitled to costs may sue out of the Supreme Court or any County Court a writ of attachment upon the fiat of a Judge.

The whole of the directions as to the proceedings to be taken for a review whether before a Judge of the Supreme Court or a County Court, shews to my mind most plainly that the same are final, and not intended to be reviewed again before any other Court; and this Court in my opinion cannot issue a *certiorari* to bring up the proceedings after review. The whole scope of the Act and the forms and language used appear to negative an inference of further proceedings after a review has been had before a Judge of either Court. There is no doubt the proceedings before a Justice of the Peace may be removed into this Court by *certiorari*. But as the writ of *certiorari* is in the discretion of the Court, they would never grant such a writ where the case had been reviewed before a Judge, as pointed out by the Justices' Act.

In *Ex parte Richards*¹ the Court refused a *certiorari* where an application had been made before a Judge at Chambers to review a case tried in the City Court of Saint John, and refused. The Court said, "By coming here, you are in reality appealing from the Judge's decision, where the Statute does not provide an appeal."

Mr. Gregory contended that the Judge had not the power to order a new trial. I am of opinion the several sections, 43, 44 and 45 of cap. 60, Consol. Statutes must be considered together in deciding upon this objection. The 45th section states "the Judge may make such order in the matter as to him may seem right, notwithstanding the return of the Justices, which shall be no bar or ground for excluding evidence by affidavit." We have not before us what appeared before the Judge on the review of this case. There may have been sufficient to warrant the conclusion he came to, in making the order, which he in his discretion, deemed right. It may have appeared that the magistrate refused to receive evidence which the defendant tendered, and which was legal evidence and ought to have been received. Would not that be sufficient to warrant a Judge in ordering a new trial? The Judge could not order a nonsuit, because the plaintiff's case was proved, and the defendant had not an opportunity of answering it by evidence—a new trial would be the only mode of rectifying the error by allowing the defendant to have the evidence received.

I am therefore of opinion upon carefully reading the several sections relating to review together, that the Judge's order remitting the case to the Justice to be properly tried, was within the discretion of the Judge, if he was of opinion that a fair trial had not been had in the Magistrate's Court.

I have considered this case upon the objections raised to the judgment on review, being of opinion at the same time, that this Court has no power to bring up the proceeding had before the Judge on review by writ of *certiorari*. The Justice's act appears to make the review allowed by the 43rd section final and conclusive between the parties. A summary mode is pointed out to be taken by the party dissatisfied with the decision of the Justice, and the Judge, after the hearing is to "decide the cause according to the very right of the matter, without regard to forms, unless the Justice acted wholly without jurisdiction." * * * "And a copy of such Judge's minute of such judgment * * * shall be evidence of such order in all Courts." This language certainly indicates that the proceeding and order of the Judge shall be final and conclusive. If a *certiorari* was to issue, to whom would it be addressed? Not to the Judge of

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this Court, for he has not the original proceedings; nor to the Justice who tried the cause, for it is removed from him by the Judge's order of review; and by the 43rd section an order of a Judge to review the case stays the proceedings before the Justice, or if an execution has issued, suspends the operation of it in the hands of the constable. All this clearly shows that the decision of a Judge in case of error was intended by the Legislature to be final.

The cases referred to by the counsel, *Burgh v. Schofield*;¹ *Teggin v. Langford*;² and *Shortridge v. Young*;³ arose under the interpleader Act, pending in that Court, and the Court held where the Judge had made an order they had the power to review his decision; but the case now under consideration is not pending in this Court, and cannot be brought into this Court by *certiorari* addressed to the Judge, who made the order complained of. The jurisdiction of the Judge is clearly statutory, and his decision is final. The statute has provided no means to remove the proceedings had before the magistrate, and the Judge's proceeding in such order of review into this Court. This Court is not a Court of error to review the proceedings had before a Judge on review under the Justices' Act.

The application for *certiorari*, I am of opinion must be refused.

ALLEN, C. J. One of the questions arising in this case is whether a *certiorari* will lie to a Judge of this Court, to bring up the proceedings before him in a case of review, under chap. 60 of the Consolidated Statutes? I agree that it will not; but that an application may be made to the Court to set aside his order, though the review is not a proceeding in this Court. I do not think the case of *Reg. v. McIntosh*, which has been referred to, affects this question. The point there decided, was that perjury could not be assigned on an affidavit of service of an order for review, sworn before a Commissioner for taking affidavits in this Court, because a review was not a proceeding in this Court.

Whether a *certiorari* will lie where the proceedings are before a County Court Judge, will be considered hereafter, in the case of *Ex parte Fahey*.⁴

¹ 9 M. & W. 478.² 10 M. & W. 556.³ 12 M. & W. 5.⁴ Post, 302.

Being of opinion that the *certiorari* must be refused in this case, it is unnecessary to consider the question that has been raised, as to the finality of the Judge's decision; but I will state my opinion on the substantial question, viz: whether a Judge has power to order a new trial in a case of review.

In this case, the review was under the 43rd section of cap. 60 of the Consol. Statutes. Whatever power a Judge has in this matter is derived from the statute itself, which declares that he "may affirm or reverse the judgment [of the Justice] or alter the same in any respect, and remit the cause to the Justice that he may issue execution for the amount awarded to either party, and affirmed on review; or enforce the payment of such amount with costs by attachment." Now, there is clearly no power given to order a new trial, unless it is contained in the words "*or alter the same in any respect.*" I construe those words as giving the Judge a discretion to do something which is neither wholly an affirmation nor reversal of the judgment: as, for instance, an increase or reduction of the amount for which the plaintiff may have obtained a verdict, or which the defendant may have recovered under a set off. If a new trial can be ordered, the judgment of the Justice must necessarily be wholly reversed; and where the judgment is "wholly reversed" the successful party is entitled to the costs, for which an execution or attachment may issue; which shews, I think, the intention of the Legislature that the affirmance or reversal of a judgment should terminate the proceedings in that suit. But further, where is the authority to the Justice to carry out an order granting a new trial? Probably, if the first judgment was in favor of the defendant, and a new trial was ordered on the plaintiff's application, he might apply to the Justice for a new summons, and by that means obtain another trial; but that would be a new action. Suppose however, the converse case—that the judgment was in favor of the plaintiff—and on the defendant's application for a review a new trial was ordered; by what means could he get the plaintiff before the Justice again in order to re-try the case? I fail to see any power in the Act to compel a plaintiff to attend before the Justice under such an order, or any authority to the Justice to hold a Court for the purpose. If the Legislature had intended that a Judge should have power to order a new trial,

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I think the Act would either have declared so in express words, or, at least, would have pointed out some mode by which such an order could be carried out; in which case, the power to make it might be inferable from general words in the Act.

I do not think that the direction to the Judge to "decide the cause according to the very right of the matter, without regard to forms," can be construed as giving him power to order a new trial. I think these words only mean that his decision is not to be influenced by any technical objections in deciding whether he will affirm, reverse, or alter the judgment of the Justice.

On the first ground, that a *certiorari* is not the proper mode of bringing the order before the Court, I think the application should be refused.

DUFF and KING, JJ., concurred in the judgment of Allen, C.J.
Application refused.

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EX PARTE FAHEY.

February. Consol. Stat. c. 60, s. 45—New trial in review under—County Court Judge—Certiorari.

A *Certiorari* will lie to bring up the proceedings in review had before a County Court Judge under Consol. Stat. c. 60 if he had no jurisdiction to make the order (WELDON, J., dissenting).

Per WELDON, J. The order of a Judge in a review case is final.

A Judge has no power to order a new trial in a review case under Consol. Stat. c. 60, s. 45 (WELDON and WETMORE, J.J., dissenting).

The facts of the case are fully stated in the Judgments.

An order *nisi* for a *certiorari* having been granted by Mr. Justice King, to bring up proceedings in review before the Judge of the County Court of Westmorland, setting aside a judgment for the plaintiff and ordering a new trial.

October 22, 1881. *J. A. Vanwart* now shewed cause. The language of the 45th section under which the order for review was made is large enough to authorize the order for a new trial. The Court will not grant a *certiorari* to bring up proceedings on review, *Ex parte Welling*; ¹ *Corbet v. McCracken*.² At all events that part of the order which sets aside the non-suit will stand, and it will be simply a reversal of the judgment.

*Wells contra. Ex parte Welling and Ex parte Richards*³

¹3 Fuga. 217.²2 P. & B. 157.³2 Fuga. 6.

concede the point that a *certiorari* to bring up an order in review will be granted under some circumstances. The Judge had no jurisdiction to make the order. The Justice would not be bound to give the notice as directed by the order in review, and if he did so, the defendant would not be bound to obey it.

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Cur. adv. vult.

The following judgments were now delivered :

WETMORE, J. His Honor, Mr. Justice King, granted an order *nisi* for *certiorari* under the following circumstances, a cause was tried before George Harshman, Esq., a J. P. and Commissioner of the Parish Court for Shediack in the County of Westmorland, wherein Thomas Fahey was plaintiff, and William B. Deacon was defendant, in which the plaintiff obtained judgment. Application for review was made to the County Court Judge for Westmorland and after hearing he made an order stating that it appearing to him that substantial justice had not been done the defendant, and that the defendant had not a *reasonable opportunity of appearing and defending the said action*—that the judgment so rendered in the cause be set aside and a new trial granted without costs of review, and that the Commissioner enter up such judgment as aforesaid in his book, and give the defendant six days notice of trial. The plaintiff Fahey not being satisfied with the judgment of the County Court Judge, applied to Mr. Justice King for an order *nisi* for *certiorari* to remove the proceedings before the County Court Judge into this Court with a view to quashing them. It was contended for the defendant on shewing cause that this Court had not power to grant a *certiorari* in such case. This objection I think cannot prevail. By section 43 of cap. 60 Consol. Statute, the review in all civil causes tried before a Justice is given to a Judge of the County Court or to a Judge of the Supreme Court. And a very wholesome power is given to the Judge on appeal to dispose of the matter. The judgment on review has almost always, and I think very properly been treated as one not to be interfered with. And though I am quite of opinion that such judgment should only be interfered with in an extreme case ; still I think this Court has power to control any such judgment by *certiorari* if its discretion should dictate interference in the matter. The Act referred to does

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not take away the right of *certiorari*, it gives the right to review and there leaves it, and unless the *certiorari* is clearly taken away, the right to obtain it exists subject, however, to the discretion of the Court as to whether or no it will order its issue. In *Ex parte Welling*¹ a rule *nisi* for *certiorari* issued to remove proceedings on review had before a County Court Judge. On the hearing, the rule absolute was refused, but not on the ground that the Court had no right to order it to issue.

It was urged for the plaintiff in the original suit as a ground for the writ that the County Court Judge had no power to order a new trial; but under section 45 (the one under which the County Court Judge has acted), I think he has. The section is—

“Upon the hearing on review, if the Judge of the Supreme Court or County Court be satisfied by affidavit that the defendant has not been legally served with the summons or first process in the cause or that he has not had a fair and reasonable opportunity of appearing or defending the same before the Justice, the same shall be a sufficient ground for setting aside the judgment, or ordering a nonsuit to be entered, or the Judge may make such order in the matter as to him may seem right, notwithstanding the return of the Justice, which shall be no bar or ground for excluding evidence by affidavit, either of the want of service of summons, or opportunity to appear as above stated.”

The affidavit to be used is thus confined—no affidavit of merits or of the state of dealings seems to be allowed—or if the ground is as in the present case that the party had not a fair opportunity of defending before the Justice, the reviewing Judge must necessarily be deprived of the ability to decide the cause according to the very right of the matter as section 43 provides, for want of knowledge of the facts, and the facts cannot be supplied by affidavit. The Judge may grant a nonsuit, but he may also make such order in the matter as to him may seem right. This order must be to remedy the existing difficulty and give the party an opportunity of being heard. The Justice below has the particulars, and if the Judge of the County Court had set the judgment aside, and all proceedings in the Justice's Court subsequent to the filing of the plaintiff's particulars, and ordered the Justice to issue a new summons, I don't see what difficulty there would have been in the Justice proceeding as if he was proceeding on the particulars for the first

time. If the defendant sought to set up the proceedings which had been set aside by the Judge's order on review they could very readily be shewn in answer; nor do I see why the present order cannot be carried out. The act gives the reviewing Judge power to make such order in the matter as to him may seem right. The judgment is set aside and the Justice is to give the defendant six days notice of trial. What is there to prevent the Justice giving a notice, briefly referring to the former judgment and setting forth the order made on review and giving the six days notice of trial, and as a matter of prudence, the plaintiff proving the former judgment, review and order thereon? I see nothing to prevent his doing so. If this cannot be done, I do not see how the plaintiff is to get along. The matter is before the County Court Judge on review. If the *certiorari* issues to quash the order, and it is quashed, there must be an end of the matter. This Court cannot give any judgment on review, it can only reach the order of the County Court Judge. He having given his judgment cannot give another one. The proceedings cannot be returned to the Justice, and he cannot issue execution by reason of the order for review, and so the matter must remain.

Had the County Court Judge ordered a nonsuit, the difficulty would have been avoided. Probably he thought the order made would save the expense of particulars, summons, and service. But having made such an order in the matter as to him seemed right, which the 45th section expressly empowers him to do, I do not see why this Court should interfere to prevent its being carried out.

The *certiorari* I think should be refused.

WELDON, J. The question in this case is whether a *certiorari* will be granted to remove into this Court the proceedings in a review case heard before a Judge of the County Court.

By the Consol. Stat. cap. 60, sec. 43, the same power of review from a judgment in a Justice's Court is given to a Judge of the County Court as to a Judge of the Supreme Court. The 45th sec. provides that if the defendant "had not a fair and reasonable opportunity of appearing or defending the action before the Justice, the Judge may make such order in the matter as to him may seem right, notwithstanding the return of the Justice."

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On the hearing the County Court Judge ordered a new trial. It was contended that the Judge had no power under the 45th section to make such an order. But I think the language of the section is wide enough to allow him to do so. The affidavit of Fahey shews that some difficulty arose on the trial between the defendant's attorney and the Justice. What it was, does not distinctly appear; but it shews that the defendant did not enter into his defence in consequence thereof. We have not the return of the Justice which he made to Judge Botsford on the hearing of the review, and therefore are not in a position to decide that matter. I am of opinion, however, that no *certiorari* lies from this Court to review the proceedings on review before the Judge of the County Court, or to hear the matter. The appeal is purely a statutory authority, and I think the *certiorari* should not be issued to bring up the judgment of the Judge granting a review on the proceedings had before him, the County Court Judge having the same power in review matters as a Judge of this Court, and it would be rather an anomaly to make an order for a *certiorari* to go to one of our own Judges. I think therefore this application must be dismissed.

ALLEN, C. J. I think a *certiorari* will lie in this case, as it is the only mode by which the decision of a County Court Judge can be brought before this Court.

The question arises under the 45th section of cap. 60; and though the words of this section are somewhat different from those of the 43rd, which was considered in *Ex parte Kane* (being intended to provide for a different state of circumstances), I do not think that it admits of a different construction. It declares that if the Judge is satisfied that the defendant has not been legally served with summons, or that he has not had a fair and reasonable opportunity of appearing and defending the suit before the Justice, that shall be a sufficient ground "for setting aside the judgment, or ordering a nonsuit to be entered; or, the judge may make such order in the matter as to him may seem right, notwithstanding the return of the Justice."

It may, perhaps, be difficult to say by anticipation, what power was intended to be conferred on the Judge by the words

"make such order in the matter," &c. It is sufficient for my purpose to say that I cannot construe them as authorizing him to order a new trial. I think, if the Legislature had intended to give that power, it would have been given in express words, as the power is given to order a nonsuit, and would not have left it to be inferred from words which are certainly vague and ambiguous, and not in any way pointing to such a power. In addition to this, I am unable (as I stated in Kane's case), to see how an order for a new trial could be enforced by the Justice. By entering a nonsuit, this difficulty would be avoided; for the plaintiff, if he wished, might take out a new summons, and proceed with his suit in the ordinary way.

DUFF and KING, JJ., concurred with ALLEN, C. J.

PALMER, J., not having heard the argument took no part.

Rule granted.

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IN RE RICHARD S. DEVEBER AND J. S. BOIES DEVEBER,
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February.

EX PARTE LEVERETT H. DEVEBER, PETITIONER.

Bills of Sale Act—Ultra vires—Defeasance—Filing of—Schedule.

The Bills of Sale Act (Consol. Stat. c. 75) is not beyond the power of the Local Legislature under "The British North America Act, 1867," as dealing with matters relating to Insolvency.

A bill of sale absolute on its face, was made subject to a defeasance or equity of redemption, but the defeasance was not filed under the Bills of Sale Act:—*Held*, that the bill of sale was inoperative, and vested no title in the grantee as against the assignee of the grantor under the Insolvent Act.

A bill of sale professed to convey all the goods and merchandise of the grantors contained in their store, situate, etc., consisting of dry goods and groceries mentioned in the schedule annexed. There was no schedule.

Quere: per ALLEN, C. J., whether the bill of sale was not thereby inoperative.

This was an appeal from a judgment of the Judge of the County Court of the City and County of Saint John, under section 128 of the Insolvent Act of 1875. The petitioner claimed all the goods, merchandise and stock of the insolvents under a bill of sale made by them in favor of the petitioner, whereby in consideration of the sum of \$20,000 they professed to convey all the goods, chattels, wares, merchandise and stock contained in their store, situate on Prince William street in St. John, consisting of dry goods and groceries mentioned in the schedule thereunto annexed. There was no schedule annexed. The bill of sale was dated the 15th

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April, 1879, but was not filed until the 4th of November following. The insolvents stopped payment on the 3rd of Nov. 1879, and made an assignment on 22nd of the same month. The bill of sale, though an absolute conveyance on its face, was in fact only intended as a security for the payment of a sum of money due the petitioner, and was to be void on the payment of that sum. The condition or defeasance was not filed.

The following is the judgment of the County Court Judge:

The bill of sale under which the petitioner claims in this case, has been attacked on several grounds by the assignee and inspector; and, after hearing counsel on both sides, I am of opinion that I cannot grant the prayer of the petition.

As between the original parties, I consider the bill of sale was valid and based upon a good and legal consideration. The Bills of Sale Act (Consolidated Statutes, chapter 75) prescribes no limit of time within which it should be filed, and, therefore, unless the rights of third parties intervene, the time of filing would be immaterial. It was filed before any proceedings were taken in insolvency, and if unobjectionable in other respects, the title of the grantee would have been complete as against all subsequent parties. But it appeared in evidence, that this bill of sale was subject to a defeasance or equity of redemption, which was not filed, and which, under the statute, should have been filed with the bill of sale, otherwise the statute expressly declares such bill of sale as against subsequent purchasers, the assignee of the grantor under any law relating to insolvency, or insolvent, absconding or absent debtors, or an assignee for the general benefit of the creditors of the maker, or as against the execution creditors of the maker, or any sheriff, constable, or other person levying on or seizing the property comprised in such bill of sale under process of law, shall only take effect from the time of filing thereof.

But it is contended that the assignee under the Insolvent Act of 1875, is not affected by the provisions of the Bills of Sale Act: indeed, that this Act, *quoad* the Insolvent Act, is *ultra vires*.

Now, whilst I fully recognize the general rule mentioned during the argument, that statutes should not be declared unconstitutional except by the courts of last resort, and then only in cases where there is a glaring want of jurisdiction, I am unable to see that the Bills of Sale Act in any way contravenes the policy or provisions of the Dominion Insolvent Laws. It does not profess to deal with the disposal or distribution of an insolvent's property; it is simply an Act for the protection of creditors, and to prevent frauds from being committed upon them. As was said in *Robinson v. Collingwood*, the object of the Bills of Sale Act was to compel a complete and true disclosure of the real nature of the bargain, in order that creditors or assignees may have the means of inquiry as to the *bona fides* of the transaction between the assignor and assignee. Under the Bills of

Sale Act, the evil to be avoided was the baffling of creditors by sham bills of sale, by which the whole interest of the grantor in the subject matter was apparently transferred to the grantee, whereas in truth some interest or trust remained in the former.

The local law of this Province has power to deal with property and civil rights; and, in so doing may prescribe the mode and conditions under which title to property may be acquired, and held: this cannot be said to be legislating upon insolvency.

In the present case both grantor and grantee knew, or should have known, that this bill of sale was liable to be defeated for noncompliance with the provisions of the Bills of Sale Act. It was made subject to a defeasance, and to secure the grantee for advances made by him and for liabilities incurred by him; yet no defeasance was filed as required by the Act. The omission to comply with the express requirements of the Act rendered the bill of sale null and void as against an assignee for the general benefit of grantor's creditors, and I am unable to see any distinction in law, between the character of an assignment made to the official assignee in insolvency, and an assignment made for the general benefit of creditors. Therefore, I take it that any assignment made by the grantor for the benefit of creditors before such filing, would defeat the bill of sale. The assignment made by the Deveybers to the official assignee, was no other than an assignment for the benefit of creditors. It was a voluntary act, done by them in compliance with a demand formally made upon them by a creditor, expressly requiring them to make an assignment of their estate and effects for the benefit of their creditors. The grantors have therefore themselves done one of the acts which, under the Bills of Sale Act, render the bill of sale inoperative in the hands of the grantee.

Mr. Weldon, in his argument, strenuously contended that the assignee in insolvency stands exactly in the same position as the insolvents themselves, and that he cannot impeach a transaction which the insolvents cannot question. Dr. Tuck, arguing on the same side, expressed a more correct view, when he admitted that the assignee represents as well the creditors as the insolvents, and that a deed void as to creditors might be set aside at the instance of the assignee. It has been decided under the Dominion Insolvent Act, that the assignee of an insolvent, although in right of the debtor he only takes such interest as the debtor was beneficially entitled to, yet, that he represents the creditors also for all purposes, and if any fraud against creditors exists in a transaction to which the insolvent was a party, the assignee may take advantage of it; a deed which is void as against creditors, is void also as against those who represent creditors.

It was also objected that no schedule was annexed to the bill of sale, although a schedule was expressly referred to in the conveying clause of it, and that no delivery was made or possession taken of the goods transferred by the bill of sale. I am of opinion that the absence of a schedule, although mentioned in it, did not invalidate this bill of sale, as I consider it was sufficiently complete and intelligible without one; and as to the want of actual delivery, that was

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in my opinion, unnecessary to pass the property, as the bill of sale, being a sealed instrument, passed the property covered by it, at common law upon execution thereof, subject however to be afterwards disputed and rendered inoperative for noncompliance with the requisites of the statute.

The contention that after-acquired property passed, was, I think, rightly given up during the argument, as it is clear that the bill of sale was intended only to convey such property as belonged to the Devebers at the time they executed it.

It was further urged on behalf of the petitioner, that in case it should be considered that the bill of sale was inoperative for want of due filing, yet, that effect might be given to it as an equitable assignment. I am clearly of opinion that this cannot be done, as the decided cases shew that such an agreement, whereby a party acquired an equitable right to the goods, requires registration as much as the most formal bill of sale. I may further remark, that even did not legal objection exist so fatal to the petition, the petitioner has failed to establish by evidence his right to an order for any goods. The proper order in applications of this nature is, that the assignee do deliver up to the petitioner such goods in his hands as petitioner has proved to be his property; but here the petitioner really has not proved that any goods claimed by him, and covered by his bill of sale, came to the hands of the assignee.

I therefore for the foregoing reasons dismiss the petition with costs.

The material grounds of appeal were as follows:

1. That the Judge improperly decided that the bill of sale was affected by the Bills of Sale Act (Consol. Stat. c. 75).
2. That the Judge improperly decided that the Bills of Sale Act was not *ultra vires* *quoad* the Insolvent Act; and did not contravene its provisions.
3. That if the Bills of Sale Act was *ultra vires*, as the property would have passed as between the insolvents and the petitioner, though the defeasance was not filed, it would also pass as against the assignee under the Insolvent Act, who stood in the same position as the insolvents, and could not set up any objection not open to them.

February 10th, 1882. *Weldon, Q. C.*, and *Tuck, Q. C.*, supported the appeal.

Barker, Q. C., and *Harrison*, contra. *Wood v. Rowcliffe*,¹ *Roe l. Conolly v. Vernon*,² *Weeks v. Maillardet*,³ were referred to on the point relating to the schedule.

ALLEN, C. J., said that a majority of the Court were of opinion that the Bills of Sale Act was not *ultra vires*, and was

¹ 16 Exch. 407.

² 5 East. 51.

³ 14 East. 508.

not a legislation on the subject of insolvency, within the meaning of "The British North America Act." He also thought the bill of sale was void under the second section of the Act in consequence of the non-registry of the defeasance, which was to be treated as a part of it. On the point relating to the schedule, he was inclined to differ from the Judge of the County Court, and to hold that the bill of sale would be incomplete and inoperative without the schedule to which it referred, and which was virtually a part of it, and was intended to designate the property to be transferred; but as the other grounds were sufficient to sustain the judgment appealed from, it was unnecessary to decide this point.

WELDON, J. I think the Bills of Sale Act is *ultra vires*, and therefore the bill of sale did not require to be filed to make it effective against the assignee of the insolvents. As between the assignee and the petitioner, I think the property in the goods included in the bill of sale passed to the petitioner on the execution thereof.

PALMER, J. I agree with the Chief Justice that the bill of sale is void under the second section of the Bills of Sale Act. I am also inclined to agree with him on the other point, but have not considered it as I should have done, if it had been necessary to decide it now.

WETMORE and DUFF, JJ., concurred with Allen, C. J.

KING, J, having been counsel in the cause, took no part.

Appeal dismissed with costs.

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IN RE RICHARD S. DEVEBER AND J. S. BOIES DEVEBER,
INSOLVENTS.

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March.

EX PARTE THE BANK OF NEW BRUNSWICK.

Bills of Sale Act—Matters of Insolvency—Ultra Vires—Assignment of debts—Registry—Future Advances—Fraudulent preference—Banking Act 34 Vict., c. 5, s. 40.

D. & Co., merchants, kept a banking account with the Bank of New Brunswick, and by deposit of collateral security, were allowed to overdraw their account to the extent of about \$20,000, up to September, 1879, when the bank refused further advances without additional security. D. & Co. requiring a further advance of \$40,000 to enable them to carry on their business, without any specific arrangement with the bank, executed a bill of sale on the 17th September, whereby in consideration of the sum of \$40,000 alleged to be paid to them, they conveyed to the bank all their goods and stock in trade, and all

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book accounts due and owing to them, as security for the payment of the \$40,000. This bill of sale was given by D. & Co. to the President of the Bank, who informed the bank Directors of it; but it did not appear that it was laid before the board, or that they approved of it, or agreed to advance the \$40,000 to D. & Co., or that any subsequent communication was made to D. & Co. respecting it; but the bank discounted notes for them, the proceeds of which were placed to their credit, and they continued to draw on the bank,—their over-drawn account being increased by about \$19,000 at the time of their insolvency. The bill of sale was not registered until the 5th November, and on the 22nd November, D. & Co. went into insolvency, having suspended payment on the 3rd November.

Held, per ALLEN, C. J., WETMORE, DUFF, and PALMER, JJ. 1. That the Bills of Sale Act was not *ultra vires*, as dealing with matters of insolvency.

2. Per ALLEN, C. J., WETMORE and DUFF, JJ. That so far as related to the goods of the insolvents, the bill of sale only took effect from the time of registry, which, being within thirty days of D. & Co's assignment, was *prima facie* invalid under section 133 of the Insolvent Act of 1875.

3. That the Bills of Sale Act only applied to personal chattels, and not to debts or choses in action, and therefore the non-registry of it would not affect the transfer of the debts; but

4. As the bank never agreed to accept the proposed security or to advance the \$40,000 to D. & Co., the debts did not vest in the bank under the bill of sale, but passed to the assignee of the insolvent.

Per PALMER, J. 1. That as the bill of sale was of no effect till registry, it was *prima facie* void both as to the goods and debts, under section 133 of the Insolvent Act, as having been made in contemplation of insolvency.

2. That if the bill of sale had been registered at the time it was given to the bank it would have been void under the Insolvent Act, it having been a transfer of all the insolvent's property, and given in contemplation of insolvency, and with intent to prefer the bank over the other creditors.

Per WELDON, J. 1. That the case was not affected by the Bills of Sale Act.

2. That the bill of sale was binding on the insolvents from the time of its delivery to the bank, and not merely from its registry; that it gave the bank a lien on the property, which vested in the assignee subject to such lien.

3. That there was no evidence that it was given in contemplation of insolvency.

4. That there was an agreement by the bank to make advances to D. & Co. under the bill of sale.

5. That as there was a debt due the bank when the bill of sale was given, it was not invalid under the Banking, Act 34 Vic. c. 5, s. 40.

This was an appeal from a judgment of the Judge of the County Court of the City and County of Saint John, under section 128 of the Insolvent Act of 1875. The appeal was made to Mr. Justice Palmer and was by him referred to this Court.

The material facts are stated in the judgments.

The following is the judgment of the Judge of the County Court:

The Petitioners have asked for an order to compel the assignee of the estate of the above insolvents to pay to them the amount of advances made by them to the insolvents, and the amount of floating balance of amount due from the insolvents to the bank, alleged to have been secured to the said bank by virtue of a certain bill of sale made by the insolvents to the petitioners, and bearing date the first day of September, A. D. 1879.

The bill of sale recites that whereas the President, Directors and Company of the Bank of New Brunswick had made, and are making advances to the said Richard S. DeVeber and J. S. Boies DeVeber, to the extent of forty thousand dollars: and, whereas, for the purpose of securing the said The President, Directors and Company of the Bank of New Brunswick, in the repayment of any and all such advances and interest, and to cover any floating balances that may be due or owing from the said Richard S. DeVeber and J. S. Boies DeVeber to the said President, Directors and Company of the Bank of New Brunswick, the said Richard S. DeVeber and J. S. Boies DeVeber had agreed to give and execute the said bill of sale; therefore the said Richard S. DeVeber and J. S. Boies DeVeber in consideration of the said sum of \$40,000 did thereby assign, transfer and set over unto the said President, Directors and Company of the said bank, their successors and assigns, all and singular the goods, wares and stock-in-trade of whatsoever kind by the said Richard S. DeVeber and J. S. Boies DeVeber, in the store or premises situate on Prince William Street, in the City of Saint John, or what might thereafter be in said store or premises then in the occupation of the said Richard S. DeVeber and J. S. Boies DeVeber, or in any other store or premises in the occupation or possession of the said Richard S. DeVeber and J. S. Boies DeVeber, or which thereafter might be in their occupation; also, all the book accounts due and owing, or which might thereafter become due and owing, from any person or persons to the said Richard S. DeVeber and J. S. Boies DeVeber, and all the right, title, interest, property, claim and demand whatsoever, of them, to, in or upon the same, and every part thereof—to have and to hold the said goods, stock-in-trade and book accounts, so assigned to the said President, Directors and Company of the said bank, subject to the powers of redemption hereinafter contained. The instrument also contained a power to the said bank to take all necessary steps for perfecting the said assignment, and to sue for and recover the said goods, stock-in-trade and book accounts; with a proviso, that if the said Richard S. DeVeber and J. S. Boies DeVeber should pay to the said President, Directors and Company of said bank the said sum of \$40,000, with interest thereon at seven per cent., at the expiration of one year from the date thereof, then the said President, Directors and Company should re-assign the said goods, stock-in-trade and book accounts to the said grantors, or as they should direct. It was also therein understood and agreed that the said President, Directors and Company should not act upon the said security, or attempt to realize thereunder until default should be made in payment of the said sum of \$40,000 and interest or some part thereof.

The Insolvents were merchants doing business in St. John, under the name of L. H. DeVeber & Sons, which was a continuation of the long established house of their father, L. H. DeVeber, who died in 1876, leaving an estate worth from \$300,000 to \$400,000, of which as was shewn $\frac{9}{18}$ fell to each of the Insolvents.

This firm had for many years kept a banking account with the Petitioners. In the spring of 1876, by arrangement with the bank,

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and by the deposit of railway bonds as collateral security, the firm was allowed to overdraw to the extent of \$10,000, and in the spring of 1879 they were allowed further to overdraw, by making a further deposit of other railway securities; upon these deposits they were in the habit of overdrawing up to about 1st Sept. 1879, to the extent in all of about \$20,000.

About this time, the amount being thus overdrawn, and the firm pressing for discounts, the bank refused to allow further overdrawings unless further security were given, and this resulted in Messrs. DeVeber offering to satisfy the bank in security if the firm should be allowed a further advance to \$40,000. This offer the bank assented to, and on the strength of the security being given, allowed the firm further to overcheck their account, and sometime afterwards, as I find, on the 17th Sept., 1879, the bill of sale now in dispute was delivered to the bank, at which time Messrs. DeVeber had overdrawn their account to \$37,816.67.

The bill of sale was filed on 5th Nov., 1879, and on the 22nd Nov. Messrs. DeVeber made an assignment in insolvency.

The bank had discounted for the firm from 1st Sept. to 22nd Nov. to the extent of \$60,000, of which \$41,858 still remain overdue and unpaid, and the floating balance of the bank account had been increased at the time of the assignment in insolvency to \$39,158.

On behalf of the assignee, a number of objections have been raised against the validity of the bill of sale, viz. :

1. That it was a transfer of substantially the whole of the insolvents' stock-in-trade and property for an antecedent debt, and therefore presumed in law to be a fraud upon creditors.

2. That it was an act of bankruptcy under section 3, sub-section (j), of the Insolvent Act of 1875, and therefore void.

3. That it was a contract within section 130, and therefore void.

4. That it was a fraudulent contract within section 132, and therefore void.

5. That it was made in contemplation of insolvency, and gave an unjust preference under section 133.

6. That it was a void contract within 13 Elizabeth, c. 5.

7. That the transfer, if valid in other respects, did not take effect until 5th Nov., the date of its filing, which was within thirty days of the time of the assignment in insolvency; and that the wilful omission to file the bill of sale until the 5th of November, was a fraud upon the creditors, and rendered the transfer void.

8. That no prior engagement has been proved to support a subsequent security: that to entitle the bank to claim for advances made on a prior agreement, it is essential that such prior agreement should be absolute, and capable of specific performance.

9. That this bill of sale, if given for future advances, is void by the Banking Act of Canada, 34 Vic., c. 5.

10. That it has not been proved what was the state of the assets or property covered by the bill of sale, on 15th day of September, nor does it appear how much of the assigned property came to the hands of the assignee.

11. If the bill of sale be good, the Bank can only recover \$18,000, or at most \$22,158, being the balance of overdrawn account, after deducting \$17,000 the sum realized from the collaterals. That this security cannot be held for discounts; that a security of such a nature, to cover discounts if expressly made, would be void under the Banking Act; and that here there was no agreement for security for future discounts.

The case for the bank, is that this deed was no plan or contrivance for the purpose of defeating or delaying the rest of the creditors, but was a *bona fide* transaction, beneficial to the creditors, and based upon an agreement whereby the insolvents obtained advances to enable them to carry on their business, and to meet their engagements.

A great portion of the law and arguments cited and urged by the learned counsel for the assignee, attacked the bill of sale as an assignment to a particular creditor, substantially of all the insolvents' property, in consideration of an antecedent debt, and as a contract void within the 130th section of the Insolvent Act of 1875.

Now, it must be remarked that this bill of sale does not profess to transfer the whole of the trader's property, for when we look at the assets of the firm as contained in the balance sheet of 1st March, 1879, we find that their shipping property, real estate and stocks, therein estimated at between \$300,000 and \$400,000, were not included or touched by this security.

Before the assignee can successfully impeach this transaction as fraudulent or void, the onus is on him to prove that it was a contract coming within some of the classes of objections he has set up against it.

Let us examine what facts were brought out in evidence to establish such proof. It appears that Messrs. DeVeber in the summer of 1879 were in good general credit, doing a large commercial business. Their balance sheet, made up 1st March, 1879, shewed, after deducting the profit and loss account and the suspense account, a clear, capital balance of over \$60,000.

They were possessed of, or interested in, a large amount of property, consisting of shipping, real estate, merchandise, and a large and extensive mill property, upon which alone nearly \$140,000 had been expended. Of this last property Mr. B. DeVeber in his evidence says, "I expected this would be a good paying concern and I so recognized it, and I think if we could have continued it on, it would have been a good thing."

Of the shipping, which in his balance sheet was set down at \$55,000, he says: "Previous to our stoppage, the vessels were doing very well—as well as any vessels afloat. We considered them good paying property."

As to their importations in 1879, he says: "We sent our buyer, Mr. Finley, home in the spring, and again in July, 1879, but he made limited purchases."

As to the circumstances under which the bill of sale was given, Mr. DeVeber tells us: "That no well regulated bank would allow large over-checking without security; that his object in making the application for the \$40,000 advance was, to get more money to carry on

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the business and to cover checks given to Messrs. Berton Bros. and others, for their accommodation, which were dropping daily into the banks, and to prevent these checks from interfering with his business." He says: "When I applied to the bank, Mr. Lewin said the bank could not make any further advances without security, and I distinctly understood that no further checks would be paid unless we gave security: our business had gone on as usual up to this time. I think it quite possible that I told Mr. Stockton that the bank was making advances on the strength of the security being given. I know that the bank did make advances beyond the \$20,000, to the extent of \$18,000 on the strength of the security being given." This evidence of Mr. DeVeber, offered on the part of the assignee, shews if anything, that Messrs. DeVeber with their large business going on as usual, and having their extensive properties and assets estimated at large figures, did not at the time of the transaction with the bank, consider his firm as unable to meet their engagements, but on the contrary, that he was anxious to obtain cash advances to enable them more easily to carry on their business. In corroboration of this view, it is notable that no interrogatory was put to Mr. DeVeber, or effort made to draw from him his opinion of the then solvency or insolvency of his house.

As to the question raised whether the bank had probable cause to believe that the affairs of the DeVebers were at that time in a state of insolvency; whether they were then so generally regarded in the community; whether they had been doing a losing or unprofitable business, no direct evidence was offered.

It now appears that when the estate came into the possession of the assignee, he ascertained that the Prince William Street real estate was under mortgage to the estate of the late L. H. DeVeber, for the sum of \$25,000, which mortgage was not registered until November, 1879. He also then ascertained that the vessels were then under mortgage to Messrs. Vaughan of Liverpool, and also that a large portion of the stocks were held in pledge. No evidence was offered before me to shew that the Bank managers, at the time of this transaction, had any knowledge of the existence of any of these incumbrances.

As to the mortgages on the vessels, Mr. DeVeber says: "I don't know that the bank knew that our ships were mortgaged, except that I told Mr. Lewin when I was drawing exchange that the Vaughans held collaterals." No questions were asked Mr. DeVeber to ascertain what knowledge, if any, the bank had concerning the other mortgages and encumbrances. All these facts so essential, if proved to exist, are left wholly unexamined into, and because the estate was found in an encumbered condition at the date of the insolvency, I am asked to infer that the affairs of the firm were in a state of insolvency at the time of this transaction; and further, that the bank had then reasonable cause to believe they were in that condition; and that Mr. DeVeber, when he was negotiating with the bank for the additional advance, knew his firm to be in such a situation; that he must have anticipated its falling into insolvency, and the transaction was such as would give to the bank an unjust preference over his other creditors.

Let us look at the objects which the parties appeared to have had in view when the transaction took place. Mr. DeVeber tells us his business was then going on as usual, and we must bear in mind that the business was a most extensive commercial business, for the carrying on of which large sums of money were daily required. Mr. DeVeber says, that on several occasions, early in September, prior to the giving of the bill of sale, he had conversations with the President of the bank concerning their large indebtedness, and the necessity for further advances to the extent of \$40,000. He says they had been up to that time steadily checking for \$20,000 against the collaterals then held by the bank; that when the additional advances were asked for, additional security was demanded; that the object in asking for the additional advances was to enable them to carry on their business; that the President of the bank then distinctly told him that no further checks would be paid unless security was given. He tells us that the advances of \$18,816 over and above the \$20,000 already overdrawn, were made on the strength of security being given.

Mr. Lewin, the President of the bank, in his evidence says, "That last autumn, towards the end of August, the firm occasionally over-checked a good deal beyond the \$16,000, and pressed for discounts. Finally the board asked me to ascertain from Mr. DeVeber what amount of money he required and what security could be given. Mr. DeVeber said he would require \$40,000 to carry him through till next summer; at this time he had overchecked to about \$20,000. I asked him what security could be given; he took some little time to consider, and early in September, he brought in the bill of sale; subsequently, the overdrawn account had increased by about \$19,000. That increase was permitted in consequence of the bill of sale being given, as it was intimated by me to Mr. DeVeber that the checks of the firm would not be paid—that we would not go on paying their checks. After the bill of sale was given, notes were discounted for them to the extent of \$128,000. The rule of the bank was not to allow an account to be overdrawn without security. The security given by the bill of sale was to secure what money DeVeber would require to carry him through; the \$40,000 was not wanted by them to clear off their liabilities to the bank. With the object to assist DeVebers to continue their business, the bank was willing to assist them if they gave security. The bank received no statement of their affairs. On the day the bill of sale was filed (i. e. 5th November), persons came in and said, 'Do you know that DeVebers have put on record a mortgage on the brick store on Prince Wm. street, and also a bill of sale on their stock to L. H. DeVeber?' Up to that time, I had not heard or known that they had stopped payment; I had heard that their notes had gone to protest. I filed the bill of sale because I heard of the mortgage and of the other bill of sale. When I spoke of further security, the overdrawn account was, in round numbers, \$20,000."

In this connection, the evidence of Mr. A. A. Stockton, who was employed by Mr. DeVeber to draw up the bill of sale, is material. He fixes the time of its execution at about the 15th or 17th of Sept.

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He says he antedated the instrument to 1st September by Mr. DeVeber's directions, and that he understood from Mr. DeVeber that advances had been made by the bank on the strength of the security being given, and that the bill of sale had to be given before the transaction would be completed, and that it was to bear date 1st September. Mr. Stockton thinks the first interview with Mr. DeVeber was on 13th September. He says, "I understood from Mr. DeVeber that there was some monetary transaction between Mr. DeVeber and the bank, by which the bank was advancing them \$40,000; that part of that advance had been made, and that he could not get the balance until he had secured the bank."

Where is there in all this, any evidence of an unjust preference? It is incumbent on the assignee, as the party impeaching this transaction as an unjust preference, to prove that it took place in contemplation of bankruptcy. The evidence only disclosed the ordinary course of dealing that might necessarily be supposed to exist between the bank and one of its largest customers.

So far from shewing that the DeVebers at this time contemplated insolvency, the assignee has not shewn any pressure by outside creditors, or any embarrassment of their affairs calculated to raise any suspicions of their perfect ability to meet their engagements. One cannot perceive in these dealings between the parties anything unlawful or unjust contemplated by either. The bank being then secured to the amount of \$17,000, and the overdrawn account at the time this negotiation began, not exceeding \$20,000, it is difficult to perceive in what way the bank would be benefited by risking a further advance to \$40,000 if they then had any doubt of the solvency of the Messrs. DeVeber. Other parties would certainly be benefited if the request of DeVeber was complied with; but those other parties would be the general creditors of the firm amongst whom the advanced money would be, and no doubt was, circulated by the DeVebers, who were thus enabled to continue their business.

This, therefore, is not a case where a mortgage or transfer is given for the purpose of securing to a particular creditor an undue or unjust preference, without any equivalent to the debtor estate. All the evidence and the nature of the transaction itself excludes such an idea. Considerable stress was placed during the argument upon the resolution passed by the bank board on 16th September, appointing the President, Vice-President and Mr. Yeats, a committee to confer with Messrs. DeVeber upon the security offered; and it was argued that no agreement existed for making the advance before that date.

On hearing the evidence bearing upon this point, I am of opinion that this was passed probably for the reason that Messrs. DeVeber were dilatory in furnishing their security; for it is clear from the evidence both of Mr. Lewin and Mr. B. DeVeber, that the negotiation had begun long prior to that, and that not only had the promise to give the security been previously made, but also that the bulk of the advances had been then obtained.

The authorities are abundantly clear, that an arrangement between a creditor and his debtor, entered into *bona fide* in order to aid the

debtor with a view of enabling him to discharge his obligations, will be sustained notwithstanding its effect is to give such creditor a preference over other creditors, for the full amount of his claim, including also, it may be, a prior indebtedness; and although the debtor should become insolvent within a short time after such arrangement. *Smith v. McLean*.¹

Neither is such a transaction an act of bankruptcy.

In the case of *In re Winstanley*,² the Chief Judge says,—In this case the debtor was in trade, he owed £287 to the appellants, and he wanted further credit from them to enable him to carry on his trade. He asked them to give him further credit; they said, we will not give you further credit unless you give us security, and therefore he gives them a security. What fraud is there in that? How can I impute to the debtor a fraudulent intention? The object of the debtor was to carry on his trade; he secured that object by procuring a supply of goods on credit from the appellants, and he retained in his own hands the management of the book debts because they were essential to the very object for which he asked credit, viz., to carry on his trade. The case having been brought up on a further appeal, Lord Justice James says, "I am of opinion that the appeal is without foundation. It is settled that an assignment of the whole of a debtor's property as a security for a sum already due, and substantial further advance, is good."

So, a security comprising all the debtor's property for an existing debt arising from a loan previously made, will not be an act of bankruptcy, if it is made in performance of an agreement entered into at the time of the loan. Clarke on Insolvency, p. 40, in a note to section 3, sub-section j., citing *Mercer v. Peterson*,³ *Jones v. Harber*,⁴ *Ex parte Fisher*,⁵ *Ex parte Izard*.⁶ Again, Clarke, p. 339, says,—“There is nothing in the insolvent law which interdicts the loaning of money to an insolvent, if the purpose is honest, and the object is not fraudulent; and it makes no difference that the lender had good reason to believe the borrower to be insolvent, if the loan was made in good faith, without any intention to defeat the provisions of the insolvent law. It is not difficult to see that in a season of pressure the power to raise ready money may be of immense value to a man in embarrassed circumstances.” Citing *Tiffany v. Boatman Sav. Inst.*⁷

So in *Risk v. Sleeman*,⁸ it was held that an arrangement *bona fide* entered into for the purpose of enabling a debtor to discharge his obligations, will be valid.

The evidence here shews that there was an express understanding and promise that security would be given before any further advances would be made, and that on the strength of that agreement further advances to a large amount were made; and that on the strength of that promise, so acted upon on the part of the bank, Mr. DeVeber gave as the security, the present bill of sale. This was, in my opinion, a fair and legitimate transaction, free from all taint of fraud, consid-

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¹ 25 Grant, 507.² 1 Ch. Div. 290.³ L. R. 2 Ex. 304 & 3 Ex. 104.⁴ L. R. 6, Q. B. 77.⁵ L. R. 7 Ch. App. 630.⁶ L. R. 9 Ch. App. 271.⁷ 9 B. R. 245.⁸ 21 Grant, 250.

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ered by Mr. DeVeber to be beneficial to his firm, certainly beneficial to his creditors, and therefore binding upon the firm, and in my opinion equally binding upon his assignee in insolvency, who has no better title in law than the insolvents themselves, except when goods are conveyed in fraud, or in contravention of the provisions of the insolvent laws. 'Tis true, the exact nature and character of the security promised to be given had not been specially defined. During the negotiation, Mr. DeVeber suggested whether the guarantee of the executors of his father's estate would be acceptable; then, he says, Mr. Lewin suggested whether Canon DeVeber's endorsement could not be obtained; this, he says, he was unable to obtain in consequence of the Canon's absence, and as some of the advances had been made on the strength of the promise to give security, and probably having been hurried up by the resolution referred to, he says he instructed his solicitor to make up the present bill of sale, which he delivered to the bank as their security. The duty and promise which DeVeber was thus under to give a security, constituted, I think, a sufficient consideration for the bill of sale when given, and moneys having been advanced on the promise to give a sufficient security, which advances conferred a benefit upon the creditors. I also think that the same duty and promise constituted a sufficient consideration in law to sustain this bill of sale, both as against Messrs. DeVeber and their assignee in insolvency. A further view which bears materially on the matter is, that it was a transaction between a bank and its customer. Late cases point out a distinction between transactions with a banker and transactions with an ordinary creditor. *Prima facie*, a conveyance even of all a debtor's property to secure a present advance, is not a fraudulent preference of the particular creditor; as, if it is for the purpose of enabling him to raise money to go on with his trade, it cannot be said to be one tending to defeat or delay his creditors, for it probably is, or may be, the wisest step he can take to promote the interests of his creditors. This is especially so, it is said, in the case of a banker, who requires security for accommodation, the immediate purpose of which is to enable the borrower to carry on business: to obtain such accommodation is consistent with commercial usage, and does not cripple his debtor in his trade. When security is given to a banker there seems to be a sort of presumption that it is given to obtain trade accommodation, rather than as a preference.

*In re, The Birmingham Banking Co.,*¹ Vice-Chancellor Stuart says—"If an arrangement is made by individuals with their bankers in order to enable them to carry on their business, how can it be said that that is an arrangement to defeat and delay creditors? Here is a company carrying on its business with a large accommodation from the bankers, and wanting larger accommodation; on an occasion of this kind, of course the ordinary rule is taken, and the banker says, your accommodations are large—I am a large creditor, if you want larger accommodation I must have some security. That is *prima facie* a legitimate transaction."

¹ 19 W. R. 44.—V.-C. S. Affirmed, L. R. 6 Qb. 88.

The present case is very similar. Messrs DeVeber, up to Sept., 1879, had been receiving large accommodation from the bank, and wanted larger; the bank refused to grant it without security; security is promised and the larger accommodation is granted, by which the DeVebers are enabled to carry on their business; daily transactions of large amounts are carried on with the bank through the months of Sept. and Oct. Deposits, exchange and discounts are daily credited in the bank account, and checks for moneys drawn out are daily charged, the detailed amount of which, as put in evidence, shews the floating balance at the end of the dealings amounted to \$39,158.24, and the amount of moneys advanced on discounts to the insolvents from 10th September amounted to \$35,000 and upwards. As was remarked in the last case cited, I can see nothing in the transaction that was not legitimate for the purposes of Messrs. DeVebers' trade, and entirely exempt from any feature of fraud, or of intention to delay or defeat any creditor. On the contrary, I view it as an honest transaction. So, in the case of *Martin v. Willyams*, where B. as a security for future advances, to enable him to carry on his business, conveyed to the bankers (who already had other securities as far as they would go) all his stock-in-trade and the moneys to arise therefrom; B. subsequently became bankrupt and the security was then impeached as being a voluntary conveyance in contemplation of bankruptcy for the purpose of defrauding creditors:—Held, the conveyance was good.

Another of the objections raised, was that this bill of sale is void under the Banking Act of Canada, 34 Vic., c. 5. This Act, under the head of Powers and Obligations of the Bank, in section 40 enacts that the bank shall not directly or indirectly lend moneys, or make advances upon the security of mortgages or hypothecation of any kind, or tenements, or of any ships or other vessels, nor upon the security or pledge of any share or shares of the capital stock of the bank, or of any goods, wares, or merchandise, except as authorized in the Act.

Section 41 gives power to a bank to take and hold mortgages upon personal as well as real property, by way of additional security for debts contracted to the bank in the course of its business.

Mr. Kaye, in his able argument, contended that the Act was only intended to define the authority of the bank: for example, that if a contract were made in which the power of the bank directors to contract was exceeded, and if nothing were done except the bare making of such a contract, that, the other party to it could not enforce it, not by reason of illegality, but for want of such authority, if that question should be raised. But supposing it were a case where a contract had been made by a corporation in excess of its powers and had been executed on one side, and the other party would do nothing but seek to hold what he had got, and refused to give the consideration in return, then a different question would arise,—Can the party take the money of the bank given in a contract for something to be returned, and say I'll keep your money, and will not make the return? Then comes an estoppel, he would be estopped from alleging the want of authority: unless the question should become one of illegality rather than of want of authority a Court would not refuse its aid to enforce the con-

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tract in support of the contention. The case of *Ayres v. The South Australian Banking Co.*,¹ was cited, which was thus: A banking company incorporated by charter which contained a clause declaring that it should not be lawful for the company to advance money on the security of merchandise, advanced money on the faith of receiving as security a preferential lien on the wool of an ensuing clip to be shorn from the sheep of the party in whose favor the advances were made, who, although not in possession, was a part owner, and agent for the other owners of the sheep, for whose benefit the advances had been made. In an appeal to the Privy Council in an action of trover, brought by the banking company, on such an agreement giving them a preferential lien, it was held that the same was maintainable, and that the banking company was entitled to recover for the value of the wool in such preferential lien. The Court said,—There may be also a question whether, under any circumstances, the effect of violating such a provision is more than this, that the Crown may take advantage of it as a forfeiture of the charter; but the only point which it appears to their lordships which it is necessary to be determined in the present case is this, that whatever effect such a clause may have, it does not prevent property passing, either in goods or in lands, under a conveyance or instrument, which under the ordinary circumstances of law would pass it. The only defence which can be set up here—there is no plea of illegality—is under the plea of not possessed,—that the right of property and the right of possession have passed to the plaintiffs, and their lordships are of opinion that whatever other effect it has, it cannot have the effect of preventing the property passing. If that were otherwise, the consequences might be most lamentable, because if the property never passed to them, they could not themselves convey any property to third persons: thus, transactions of the most honest description might be set aside.

Mr. Brice, in his book on *ultra vires*, page 824, commenting on this case says, the case clearly exhibits the exact meaning and legal import of *ultra vires* in the secondary sense, that it relates to matters which previously concern only the corporation, so that if they acquiesce, outsiders cannot raise the question.

I adopt the reason and authority of the above case as applicable to the present one on hand; from which it would follow that this bill of sale is valid, notwithstanding the Bank Act, and that the property in the stock and trade vested in the bank by the transfer, and consequently the Messrs. DeVeber and their assignee in insolvency are estopped from disputing its validity under the Bank Act. Should any doubt however remain on this point, I take it to be clear that the bill of sale can be treated as a valid security under the 41st section of the Bank Act for the moneys advanced and owing to the bank, up to the time of its delivery on the 17th September. On that date there was an indebtedness from Messrs. DeVeber, contracted to the bank in the course of its business, of \$20,816 for floating balance, and \$4,720 for moneys advanced to Messrs. DeVeber on discounts between the 8th

¹L. R. 3 P. C. 548.

and 17th September. It cannot, I think be objected in this view that the transaction was in violation of the provisions of the Bank Act, which prohibits loans upon the security of merchandise, inasmuch as these advances were not made on the condition or with a view of receiving the particular security on goods and merchandise. •Then again this bill of sale, so far as it relates to the assignment of the book debts of the insolvents in consideration of past and future advances, is not affected by the Bank Act, and I see no reason why the bank may not avail themselves of the security of the book accounts assigned by the bill of sale for the balance due to the bank on all such advances up to the time of the close of the dealings between them.

It was further contended, that although the bill of sale was executed and delivered in September, yet as it was not filed until 5th November, which was within thirty days of the assignment in insolvency, it must be presumed to have been made in contemplation of insolvency, and therefore void.

At Common Law, the property passed to the bank at the time of its execution and delivery, liable however under the Bills of Sale Act to be defeated, if the requirements of that Act should not be complied with. By that Act, no time is limited within which a bill of sale shall be filed, but it says every bill of sale within the Act shall be filed, otherwise as against certain classes of persons named, it shall only take effect from the time of its filing. In this case the bill of sale was filed on 5th November, being seventeen days before the making of the assignment in insolvency. Therefore, so far as the Bills of Sale Act is concerned, it possessed all the validity which that Act could confer upon it, and unless declared void under that Act for fraud or other legal cause, it would relate back and take effect from the time of its execution and delivery; therefore, this ground of objection cannot prevail. Moreover as a large portion of the property comprised in this bill of sale was book accounts, to which species of property the Bills of Sale Act does not apply, it is open to question whether this bill of sale is within the Act for any purpose.

Mr. King very urgently and gravely contended that inasmuch as Messrs. DeVeber were allowed to remain in possession of the assigned property, and to realize upon the same and retain the proceeds, they must be considered as the agents of the bank, and that to the extent of their receipts the claim of the bank under the assignment must be considered as discharged and satisfied. This proposition ignores the material fact in this case that, by the terms of the assignment, the grantors were to hold and use the assigned property to enable them to carry on their business, and that the bank had no right to interfere with such possession for one year, or until Messrs. DeVeber should make default in repayment of the moneys secured.

The next question to determine is, whether the moneys given to Messrs. DeVeber upon discounts are to be considered advances under the bill of sale. The bill of sale recites that the bank had made, and were then making advances to Messrs. DeVeber, and for the purpose of securing the repayment of any and all such advances and interest, and to cover any floating balance that might

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be due to the bank, the security was given. Mr. Lewin, in his evidence, referring to the occasions when he was requiring further security, says "the firm had overchecked a good deal, and pressed for discounts, and the board wished me to ascertain from Messrs. DeVeber what amount of money they required and what security could be given." From this it would seem that the bank contemplated getting security as well for moneys given on discounts as upon overchecking. Mr. Lewin further says "after the bill of sale was given, notes were discounted for them." He further says, "In August, their name was on paper for discount pretty large; the board appointed myself, Mr. Yeats, and Mr. Gilbert, to see DeVebers and ascertain how much money they wanted, etc." Further on he says, "the security given, was to secure what money DeVebers would require to carry them through." This would evidently include paper they would send to the bank for discount as well as checks they would send for money. Mr. Lewin further says, "The proceeds of the notes were placed to the credit of the firm; some of the notes would be renewed."

Mr. DeVeber's evidence would leave the question open to doubt: he says, "we got discounts after the bill of sale; there was no agreement about discounts that I remember of, for the bill of sale; it was understood that the advance of \$40,000 should be entirely a cash advance, and as I recollect it, nothing was said about discounts in connection with the bill of sale."

By the bank account current, put in evidence, shewing the daily transactions from 1st September to 19th November, when the dealings closed, we find it made up on one side of deposits, discounts and exchanges placed to the credit of Messrs. DeVeber, and on the other side of checks, drawn and charged against them. The floating balances were made up daily from these debits and credits; the checks were drawn against these deposits, discounts and exchanges. Now, as a discount is a loan of money, first deducting the interest, I take it that these moneys credited for discounts made for Messrs. DeVeber by the bank, and for the purpose as requested, of carrying them through, were so many advances made to them, and credited in their bank account, to be drawn against, or checked out at their pleasure, and that the same come within the objects for which the security was given.

Looking at all the circumstances and the evidence in this case, I find as a matter of fact, that the agreement for the security, and the making of the subsequent advances, and the subsequent giving of the bill of sale in pursuance of such agreement, are all *bona fide* and for the purpose of assisting Messrs. DeVeber to continue their business, and not for the purpose of any unfair, fraudulent or unjust preference, or of defeating any of the provisions of the insolvent laws, as I believe that Mr. DeVeber acted in good faith, honestly, at the time believing that if he could get the advances asked for, he would be able to go on and continue the business. In applying the evidence to section 130 of the Insolvent Act, I can see no ground for finding that the bank knew, or had any probable ground for believing, that the DeVebers were at the time of the agreement for security or of

the giving of it, unable to meet their engagements. I am the more persuaded of this when I consider that at that time they were in good general credit; that as I have before remarked, they had then in their possession, and under their control, large amounts of various kinds of property; that their books which appear to have been kept with great care and system would, if looked at, have shewn that at their last annual balancing, they had an ostensibly clear capital of \$60,000 and upwards.

As to 132nd section, which is said to be a re-enactment of the Statute of Elizabeth, c. 5, it appears to me there is no pretence for charging any fraud or fraudulent preferences. So far from this transaction being one to defeat or delay creditors, the obtaining advances to so large an amount, at so long a credit and at ordinary bank rates, was one rather calculated to benefit creditors, by enabling the debtors to continue their business.

Neither are the objections raised under section 133 maintainable; as I am satisfied from the evidence that the Messrs. DeVeber, however disastrous their affairs may ultimately turn out, by their liquidation in insolvency, fully believed at the time of entering into this transaction in their ability to continue their business and meet their engagements. Neither can the giving of this security, which carried out in good faith a prior agreement, upon which moneys were advanced to aid the insolvents, be considered an unjust or unlawful preference.

The next inquiry is, what amounts were advanced for which the bill of sale should be held as security?

In considering the evidence of both Mr. Lewin and Mr. B. DeVeber, I find that the negotiation for the giving of the security, and promise of giving it, took place some days before the bill of sale was given, being as they both say in the early part of September. I therefore set it down at the eighth of September.

The floating balance at the end of that day was.....	\$23,333 58
At the close of the 17th day of Sept., the day which I found the bill of sale was given, the floating bal. was	37,816 67
This increase I find was made on the strength of the security promised.	
Deduct amount realized from collaterals.....	17,000 00
Balance due on floating balance on 17th September.....	20,816 67
Advances made on discounts for insolvents from 8th to 17th September.....	4,720 00
Full amount of advances due on 17th September.....	\$25,536 67
Add further increase on floating balance from 17th Sept. to 22nd November.....	1,341 57
Also advances on discounts for insolvents from 17th Sept. to 22nd November.....	37,138 31
Due for floating balance and advances from 8th Sept. to 22nd November, 1879.....	\$64,016 55

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<i>In re</i>	under their bill of sale for floating balances, amount-	
DEVEBER :	ing in all to.....	\$22,158 24
<i>Ex parte</i>	Advances on discounts to amount of the balance of the	
THE BANK OF	\$40,000 secured, being,.....	17,841 76
NEW BRUNS-		
WICK.		
		<u>\$40,000 00</u>

With interest thereon from 22nd November, 1879, to date of payment by the assignee.

To the objection that it did not appear how much of the stock-in-trade and book accounts came to the hands of the assignee, we have it in evidence that out of the goods which were in store of insolvents on 1st September, he has realized the sum of... \$23,833 51

Out of the stock-in-trade which insolvents acquired and placed in their store after 1st Sept., he has realized the sum of \$18,769 09

He has realized from debts due to insolvents on 1st September, 1879,..... \$16,130 60

And from debts which became due after 1st September he has collected..... \$29,173 04

I therefore, for the foregoing reasons, grant the prayer of the petitioners and order that the Assignee do pay to them out of the moneys derived by him from the insolvents' estate, the amount of the said security to the sum of forty thousand dollars, with interest thereon at the rate in the said security reserved from the date in the said assignment in insolvency; and also, that he do pay to petitioners their costs of these proceedings.

The grounds of appeal were as follows:

1. That the Judge of the County Court was wrong in finding as a fact on the evidence or holding as a matter of law, that the bill of sale in question did not profess to transfer the whole of the insolvents' property so as to bring it within the Insolvent Act of 1875 and amending Acts and render it void as against the assignee.

2. In not finding as a fact, and holding as a matter of law that the said bill of sale was fraudulent and void under the said Acts as against the assignee.

3. In not finding as a fact and holding as a matter of law, that the said bill of sale and the agreement therefor, if any, were void under the Banking Acts of Canada.

4. In not finding as a fact and holding as a matter of law, that the said bill of sale was a contract by which creditors of the insolvents were hindered, obstructed, and delayed, made by the insolvents when unable to meet their engagements, and afterwards becoming insolvent, and at the time the bank knew of such inability existing, and that

the said bill of sale was presumed to be made with intent to defraud creditors and therefore void.

5. In not finding as a fact and holding as a matter of law, that the said bill of sale was a conveyance made with intent fraudulently to impede, obstruct, and delay creditors, or with intent to defraud creditors, and so done and intended with the knowledge of the Bank of New Brunswick, and that it had the effect of impeding, obstructing, and delaying the creditors of the insolvents, and was therefore void under said Act.

6. In not finding as a fact and holding as a matter of law, that the said bill of sale was a pledge or transfer of property made by persons in contemplation of insolvency by way of security for payment to the bank, and that thereby the bank obtained or would obtain an unjust preference over the other creditors, and therefore the said conveyance was void.

7. In not finding as a fact and holding as a matter of law, that the said bill of sale was a conveyance made with the intent to defraud and delay creditors and therefore void.

8. In not finding as a fact and holding as a matter of law, that the said bill of sale or conveyance was an act of bankruptcy under the above Acts and therefore void.

9. In not finding as a fact and holding as a matter of law, that the bill of sale only took effect from the time of its filing, namely, the 5th November, 1879, and that being within thirty days of the assignment in insolvency, it would be presumed *prima facie*, to have been made in contemplation of insolvency.

10. In not finding as a fact and holding as a matter of law, that the said bill of sale was kept from filing by the said bank from the time of its delivery, until November 5th, 1879, and that it was so done in fraud of creditors, and that therefore the transaction was such as to render the conveyance void.

11. In not finding as a fact and holding as a matter of law, that the said bill of sale was a transfer substantially of the whole of the insolvents' estate, and of their property, and for an antecedent debt, and therefore presumed in law to be a fraud on creditors.

12. In not finding as a fact that it was not proved how much of the property of the insolvents, owned by them on September 15th, 1879, came into the hands of the assignee.

13. In not finding as a fact and holding as a matter of law, that the said Bank of New Brunswick had failed to make out the allegations in the petition.

14. In not finding and holding under the evidence, that there were no advances made on the faith of the said bill of sale before it was given, on or about the 17th day of September, 1879.

15. In not holding that there was no agreement to give any such security as would warrant the bank in making any such advance, before the security was actually given.

16. In not holding that after the security was given, no advances were made which were covered by it, and that the same was void as only covering a past indebtedness.

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17. In not holding that if any promise or agreement to give security were made, previous to the execution and delivery of the bill of sale, it was in no way binding, and any advances made on the faith of such promise or agreement, could not under the facts proved be secured by the bill of sale when given.

18. In not finding as a fact and holding as a matter of law, that if any promise or agreement to give security, when given, it was to give security for \$30,000 or \$40,000 cash advances, and that the bank never in fact made any such advances, either on the strength of receiving the said security or upon the said security when executed and delivered.

19. In not finding as a fact and holding as a matter of law, that the alleged agreement for advances not having been carried out by the said bank, (although they had opportunity to carry it out but in fact refused to do so) it was not competent for the said bank to retain the bill of sale as a security for the amount determined by the learned Judge.

20. In not finding as a fact and holding as a matter of law, that there was no agreement to give the security mentioned, that is, the said bill of sale.

21. In not finding as a fact and holding as a matter of law, that there was no agreement to give any security that would cover this bill of sale.

22. In not finding as a fact and holding as a matter of law, that there was no agreement of which specific performance could be decreed to give any security.

23. In not finding as a fact and holding as a matter of law, that if the bill of sale were good the bank was entitled at most to the amount the account was overdrawn on September 17th, 1879, beyond the \$20,000, and that the bill of sale could not be held for the discounts, and that an agreement or security of such a nature, to cover future discounts, would be void under the Banking Acts.

24. In not finding as a fact and holding as a matter of law, that there was no agreement that discounts should constitute a part of the advances covered by the bill of sale.

25. That the finding of the learned Judge is not supported by the evidence.

The arguments of counsel on points not referred to in the judgments have been omitted.

April 14, 19 and 20, 1881. *Barker, Q. C.*, and *Harrison*, supported the appeal.

1. The bill of sale as against the assignee must be treated as if it was made the day it was filed (5th November, 1879). Consol. Stat., cap. 75, sec. 1. This being within thirty days of their assignment it must by the 133 section of the Insolvent Act be presumed to have been made in contemplation of insolv-

ency. The insolvents had actually stopped payment before the bill of sale was filed.

2. The bill of sale was itself an act of insolvency. It professed to convey the whole of the property which the insolvents had and which they required to carry on their business: *Ex parte Bailey*;¹ *Ex parte Bland*;² *Lindon v. Sharp*;³ *McLeod v. Wright*;⁴ *Marks v. Feldman*;⁵ *Ex parte Stevens*;⁶ *In re Gibson*;⁷ *Sebert v. Spooner*;⁸ *Davidson v. Ross*.⁹

3. Assuming that the bill of sale could take effect from its execution, it could not be supported if given to secure a past debt. There was no agreement for future advances. The evidence shews that the bill of sale which was given to secure a cash advance of \$40,000 was never accepted or acted upon by the bank up to the day of filing. The discounts which the insolvents got subsequent to the deposit of the bill of sale with the President of the bank were not the advances contemplated: *Ex parte Kilner*;¹⁰ *Ex parte Cooper*;¹¹ *Ex parte Fooley*;¹² *Graham v. Chapman*.¹³

4. The bill of sale was void under the Banking Act 34 Vic. c. 5, s. 40, which prohibits banks from advancing money on the security of personal property.

April 21, 22, 23 and 25. *Kaye, Q. C.*, and *Weldon, Q. C.*, contra.

1. There was a complete delivery of the bill of sale by the insolvents to the President of the bank. It recites that the bank were making advances to the extent of \$40,000, and that it was given to secure such advances and any floating balance due. This would estop the insolvents, and the assignee who represents them, from setting up that there was no agreement for future advances. The discounts may fairly be treated as advances. The bank would also be entitled to hold the property by virtue of the general lien which they had as bankers.

2. The contract between the bank and the insolvents was made on the 17th of September, and when the bill of sale was filed on the 5th November, it related back to the time it was delivered. In order to test its validity under the Insolvent

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¹³ DeG. M. & G. 534.¹⁶ DeG. M. & G. 757.¹⁴ M. & G. 895.¹¹ P. & R. 62.¹⁵ L. R. 4 Q. B. 481.⁶ L. R. 20, Eq. 786.⁷ 8 Ch. D. 230.¹ M. & W. 714.²⁴ Grant 22.¹⁰ 13 Ch. D. 945.¹¹ 10 Ch. D. 312.¹² L. R. 3 Ch. App. 515.¹² C. B. 85.

1882. Act, it must be treated as a contract made on the 17th Sept.
In re The non-filing at that time is no evidence of fraud or of an
 DEVEBER: intention to give an unjust preference: *Ex parte Harris*,¹
Ex parte *In re Jackson*.² It was not filed, because the bank did not
 THE BANK OF want to injure DeVebers' credit. This was a voluntary act on
 NEW BRUNS- the part of the bank and was not part of the agreement with
 WICK. the DeVebers. *McLeod v. Wright* is distinguishable from this
 case. There the knowledge of Brown's insolvency was brought
 home to Wright, who, after acquiring this knowledge, made no
 advances; moreover the transfer was made to Wright for the
 express purpose of defeating the Insolvent Act. Here the
 bank went on advancing, to enable DeVebers to carry on their
 business, and by the terms of the bill of sale they could not
 interfere with the business for a year. There was no fraud in
 fact: *Jones v. Harber*.³

3. The Bills of Sale Act does not apply to an assignee in
 insolvency who becomes such after the filing of the bill of sale.
 The object of the Act was to protect persons who purchased
 after the delivery and before the filing of the bill of sale. After
 the filing there is notice and no person then purchasing the
 goods can be prejudiced. The Insolvent Act only vests in the
 assignee the property which the insolvent had at the time of
 the assignment; here the insolvents had no property at that
 time. The assignee takes the estate subject to the same charges
 as the insolvent held it: *Ex parte Allard*,⁴ Insolvent Act 1875,
 section 16. The Bills of Sale Act has no relation back: *Pat-
 tison v. Tingley*.⁵

4. The Act is *ultra vires* so far as it declares that it shall not
 have any effect against an assignee of an insolvent. It is a
 dealing with the question of insolvency which belongs exclus-
 ively to the Dominion Parliament.

5. The assignment of the debt is not affected by the Bills of
 Sale Act which only relates to the transfer of chattels, and as
 the good part can be separated from the bad, it will stand as
 to the debts at all events, even though it might not be good as
 to the other property: *In re Eslick*.⁶

6. The assignee is estopped from setting up that the bill of

¹L. R. 8 Ch. App. 48.
²4 Ch. D. 682.
³L. R. 6 Q. B. 77.

⁴16 Ch. D. 506.
⁵5 Allen 553.
⁶4 Ch. D. 508.

sale is void under the Banking Act. The insolvents having obtained a large advance on the faith of this security could not set up that it was void, and their assignee is in no better position. The question of the bank exceeding its powers under the Banking Act can only be raised by the Government in a proceeding to take away the charter: Brice on *ultra vires*, 824. The Act was intended to protect the stockholders. They might have a right to bring the directors to an account, but a stranger who gets the money from the bank has no right to raise the objection.

Barker, Q. C., in reply. There is nothing in the contention that the Bills of Sale Act is *ultra vires* so far as it relates to insolvency. The Insolvent Act exempts from its operation property which is not subject to execution. The local Legislature could pass an Act declaring that certain property which is now subject to execution should be exempt. This would be a dealing with the subject of insolvency quite as much as the Act relating to the registry of bills of sale.

Cur. adv. vult.

The following judgments were now delivered:

PALMER, J. The first question in this case is, when the goods and debts mentioned in the instrument set out in the case, dated the 1st of September, 1879, but really executed on the 17th, were transferred. It professes, in consideration of \$40,000 paid the insolvents by the bank to assign to the bank all the goods then in the insolvents' store, or that might afterwards be put in the store, and all book debts due the insolvents as security for the \$40,000; and appointed the bank the attorney for the insolvents, to collect the debts, and take possession and sell the goods and debts. No possession was taken by the bank. The insolvents stopped payment on the 3rd of November, and this instrument was filed under the Bills of Sale Act on the 5th of November.

To decide this question, I will first have to consider whether the instrument is a bill of sale covered by the Bills of Sale Act, (Consol. Statutes, chap. 75.) I think it will assist to determine this, if we read the 1st section of that Act by interpolating what bill of sale is defined by that Act to mean in lieu of the words bill of sale. Doing this, the 1st section will

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read as follows: "Bills of sale, assignments, transfers, declarations of trusts without transfers and other assurances of personal chattels, and also powers of attorney, authorities, and licenses to take possession of personal chattels as security for any debt, etc., as against the assignee of the grantor, under any law relating to insolvency, etc., shall only take effect from the time of the filing thereof." There can, I think, be no question but that according to this definition, this instrument is covered by the Act, and it follows as a matter of demonstration that it can have no effect in law until the 5th of November, when it was filed, if the Legislature that made that enactment had power to make such a law, and consequently then, and not until then, it could transfer any property or right of any kind as against the assignee of these insolvents. For if it did transfer any property or altered or affected the assignee's rights in any way it would then have some effect, the very thing the statute in plain words has declared it shall not have, and I am not at liberty to disregard those plain words from any supposed inconvenience, hardship or injustice, even if I thought such existed.

This is the rule enunciated by the Judges in the House of Lords in *Warburton v. Loveland*.¹ The rule is, "*Verbis planè expressis omnino standum est.*" "If," said Pollock, Chief Baron, in *Miller v. Salomons*,² "the language used by the Legislature be clear and plain, we have nothing to do with its policy or impolicy, its justice or injustice, its being framed according to our views of right or the contrary; we have nothing to do but obey it, and administer it as we find it; and I think to take a different course is to abandon the office of Judge and assume that of Legislator."

If I am right thus far, it follows that there was no transfer of this property until the 5th of November, and it was then transferred, if transferred at all, as against the plaintiff; and the grantors assigned in insolvency on the 22nd of November, only seventeen days thereafter, and they were hopelessly insolvent and all parties knew it at that time. Then the 133rd section of the Insolvent Act of 1875 enacts "That if any transfer be made of any property, etc., by any person in contemplation of insolvency by way of security for pay-

¹ 11 Hud. & Br. 648.

² 7 Ex. 560.

ment to any creditors, etc., such transfer, etc., shall be void; and if the same (*i. e.* transfer) is made within thirty days next before a demand of assignment, etc., or at any time after when such demand is followed by an assignment, it shall be deemed *prima facie* to be so made in contemplation of insolvency."

If the Bills of Sale Act is in force, I am simply following the plain words of that statute in saying that the above is the effect of the instrument. It follows that such transfer is void *prima facie*. I have purposely refrained from citing and criticizing the numerous cases to be found in the books, decided under the Imperial Bills of Sale Act, because that Act and ours is so entirely different in respect to the point involved in this case. They really have no bearing on it, and are in my opinion, only calculated to mislead. Both acts were passed to remedy the evil of secret transfers of personal chattels, but the two Legislatures have attempted to do this in entirely different ways: the Imperial by allowing such transfer to operate against creditors, etc., without registering for a certain time, and then to become void if not registered within the time designated, and not authorizing any subsequent registering of it to make it good: ours, on the other hand, preventing such instrument from operating at all against creditors, etc., until registered, and allowing it to operate as against such creditors, etc., by registering at any time, from the time of such registering. But it is contended that if this instrument is of no effect to transfer the chattels until registry, that it operated to transfer the debts from its date; and for this principle the bank's counsel has cited a number of English cases, decided under the Imperial Act, which clearly enough decide that such would be the effect of this instrument under that Act. I confess I was at a loss to reconcile this view with the plain words of our statute. That the bill of sale (that is the instrument itself) should have no effect until, etc. Surely I would be giving some effect to the instrument, and plainly going in the teeth of the statute if I allowed it to have the effect of transferring the debts. But looking at the Imperial statute, 41 and 42 Vic., chap. 81, sect. 8, the reason of the English decision is obvious. The words of that enactment are, *inter alia*, as follows: "That instruments

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shall be fraudulent and void, so far as regards the property in or the right to the possession of any chattels comprised in such bill of sale, etc." From which it will readily be seen that such enactment only makes the instrument void as regards the right of property in chattels, and, in effect, plainly excepts every thing else; whereas ours, on the contrary, plainly says that such an instrument as the one in question in this case, shall have no effect whatever as against this plaintiff until it is registered, or, rather, filed; and therefore as soon as it is determined to be the instrument described by the enactment, the words are clear, it can have no effect for any purpose whatever. It follows that, in my opinion, the transfer of both chattels and debts was made on the 5th of November and not before, and within 30 days next before the assignment in insolvency, and was *prima facie* made in contemplation of insolvency; which *prima facie* case is not disproved by any evidence in the case, but rather the contrary; for at that time, not only were the grantors hopelessly insolvent, but they had stopped payment, and the person who filed the bill of sale and consequently made the transfer, knew this, and made such transfer in consequence of such knowledge, and therefore such transfer is in the words of section 133 of the Insolvent Act, null and void, and all the property contained in it belonged to the plaintiff, as assignee of the insolvents.

But it is said that the part of our Bills of Sale Act that declares that it shall not have any effect as against the assignee of an insolvent is *ultra vires* the local Legislature. The considerations that I have already mentioned shew, I think, that there is nothing in such contention. The subject dealt with by the local Legislature by such legislation is the right of property, in other words the interest, if any, acquired by the defendants by the bill of sale: as the law stood at the time of the passing of the Act they would have acquired an absolute right against all the world to what they claim, and it became expedient to alter that law and make such instrument inoperative in certain specified events, one of which is, if the grantor assigns in insolvency, or say, commits a crime. In both cases the power to create the crime or compel the insolvency is in the Dominion Parliament, and the question is,

which is the proper Legislature to legislate on the subject of the right of property in the way I have mentioned.

The thing to be directly affected is the property of the defendants, a subject upon which the local Legislature has by section 92, sub-section 13, of the British North America Act, exclusive power to legislate, and the Dominion parliament is given no such power expressly. The only power they can have to affect that subject is what they may do as incident to the exercise of their power to legislate with reference to subjects mentioned in section 91, one of which is insolvency.

This incidental power is in derogation of powers exclusively given to the local Legislatures, and only given by implication and *ex necessitate rei*, and, therefore, must be confined strictly to such necessity and, perhaps, the Act can present no more difficult subject for construction than where to draw that line of necessity. Lawyers attempting this must always be met with the difficulty that they are, to some extent, allowing the Dominion Parliament to exercise legislative powers that are, by the express words of the Act, not only given to another legislative body, but given to it exclusively.

Chief Justice Ritchie in *Valin v. Langlois*,¹ says: "That while the rights of the local Legislature are in this sense subordinate to the rights of the Dominion Parliament, I think that such latter right might be exercised so far as may be consistent with the right of the local Legislature and, therefore, the Dominion Parliament would only have the right to interfere with property or civil rights in so far as such interference may be necessary for the purpose of legislating generally and effectually in relation to matters confided to the Parliament of Canada."

Even if this power to legislate so as to affect the right of property does not exist in both Legislatures concurrently, I cannot see how a law made for the protection of creditors and *bona fide* purchasers against secret bills of sale allowing them to have full force against parties making them, but of no effect in case of an assignment in insolvency or otherwise could so prevent the Dominion Parliament legislating generally and effectually on the subject of insolvency as to prevent the local

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¹ 3 Can. S. C. R. 1.

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Parliament legislating on the subject so exclusively and expressly given them.

This law, as I before pointed out, has made a bill of sale not registered defeasible by several conditions subsequent, and that is all the right the bank ever had under it or the grantor ever transferred. The rest remained in him and would be in him even if it were not for the 16th section of the Insolvent Act of 1875, which enacts that all the rights of an insolvent are vested in the assignee in the same condition as he had them himself and when one of the conditions happened which defeated the bank's right to the property and made it revert to the insolvent, it was transferred by force of the section to the assignee. This in my opinion was a legislation by the Dominion Parliament that would give the plaintiff a right to this property.

It must also be borne in mind that the Insolvent Act gives the assignee the rights of the insolvent's creditors.

I have thought best to put my decision on the Bills of Sale Act, but I fully agree with the majority of the Court that the instrument could not be supported even if the Bills of Sale Act had been complied with, on several grounds.

1st. I think that the DeVebers were hopelessly insolvent when they signed the bill of sale, and that the agents of the bank knew it, because not only was the security or transfer to the bank of all their stock, without which it was impossible for them to continue their business, but Mr. Lewin in his evidence, says that Boies DeVeber told him that he would require \$40,000 in addition to the \$20,000 then over-checked, to carry them through until next summer, and there is no pretence that the bank ever agreed to, or did advance them that amount on this account, and therefore if such a transaction as is now set up was intended to have taken place between them, it could in my opinion have only taken place in contemplation of insolvency, and with the intention to prefer the bank.

But I think there never was any agreement by the bank that they would accept this security, nor do I think that they intended to do so; nor was there anything advanced on it; indeed I think the evidence shews that the bank never advanced anything to the insolvents on this account after the 17th of September, the day on which the bill of sale was taken into the bank.

On that day their account was overdrawn \$38,814.67, which is the highest amount that the insolvents ever owed on overdrawn accounts. This amount stood the same with the exception of slight reductions, until the insolvents stopped altogether.

From this and the consideration that the 40th section of the Dominion Banking Act, 34 Vic., chap. 5, enacts *inter alia* that a bank shall not lend money, or make advances upon the security or mortgage or hypothecation of any goods, wares or merchandise, except as authorized by the Act, which would not include this transaction, I am satisfied that the bank never agreed or intended to accept the insolvents' proposals and never accepted the bill of sale, until the insolvents stopped, and then they had it recorded to endeavour to get some benefit under it. If the bank accepted this security and agreed to let the insolvents over-check to the amount of \$40,000 in all, why was not this done?

I do not wish to be understood as deciding that if this bill of sale had been unquestionably accepted and the bank had agreed to advance money upon it, and had done so, that it would be void by virtue of the Banking Acts, or rather that the insolvents after getting the money under it could avoid it; but I think I ought not to find that such a contract was made, or even that such was intended by the bank without the clearest evidence, for it must always be borne in mind that what is sought to be made out is that the bank deliberately violated the law, and if such a charge was made against them, before I would find it, I would require the plainest evidence. Much more would I require such evidence when they themselves set up that they intended to and did so violate the law. Surely any Court before they can be called upon to believe such a thing, ought to have the clearest evidence of it.

Some of my brethren appear to think that my opinion that this instrument, under the Bills of Sale Act, had no effect until it was recorded was based on the idea that the Bills of Sale Act applied to nothing but chattels, I quite agree with them that it does not, and therefore it does not in my opinion affect an assignment of debts; but this bill of sale includes in it chattels as well as debts, and therefore is an instrument as defined by the Bills of Sale Act as a bill of sale, and when

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that Act plainly says that such an instrument shall have no effect until filed, that by plain words applies to the whole instrument, and I cannot see how I can say that it shall have the effect of transferring the debts in it, when the statute says it shall have no such effect. I cannot see the slightest warrant for saying that the instrument may operate for some purposes and not for others.

If it had enacted as the Imperial statute does, that it should have no effect to transfer the chattels, then it might operate for any other purpose.

The whole question is, what is the fair meaning of the words used in the statute, and I think it impossible to give them any other meaning than I have given them.

WELDON, J. This is an appeal from the judgment of his Honor Judge Watters, of the County Court of the City and County of Saint John, allowing the claim of the Bank of New Brunswick to the amount of \$40,000 as a preference claim on the stock of the insolvents, by virtue of a mortgage made by them in September, 1879.

The objections to the judgment are set forth in detail, but they may be embraced in a few general ones, viz: The Judge not finding in fact that the bill of sale, by way of mortgage of September, 1879, was fraudulent under the Insolvent Act, having been made to prefer particular creditors, and to delay other creditors, and if valid the security would only cover advances made after the bill of sale was given, and not prior advances; and overcheckings were not advances, and not finding as a fact and in law the bill of sale and agreement therein, if any, were void under the Banking Acts of Canada. And the bank not having filed in the registry office the bill of sale until the 5th of November it only takes effect from that day, and as the insolvents went into insolvency on the 22nd November it is, under the 133 section of the Insolvent Act of 1875, *prima facie* invalid, only taking effect from the date at which it was filed.

It may be well to answer this last objection before referring to the others. I am of opinion we should consider this case solely under the provisions of the Insolvent Act of 1875 and the amendments thereto. The Bills of Sale Act passed by the

Provincial Legislature cannot control or enlarge the same and does not, I think, in any way affect this case. What the insolvents had at the time of the assignment passed to the assignee, subject to any lien. The bill of sale by way of mortgage made by the insolvents to the bank, executed and delivered on the 17th September, to take effect from the 1st September, the bank retained in their possession until the 5th of November when it was registered. The insolvents assigned on the 22nd of the same month. It was a valid instrument, not impeached, and binding on the DeVebers when they made their assignment from the time it was delivered to the bank and not on the 5th November, when registered. The bank had a lien on the goods and debts specified in the said bill of sale and what might be brought into their building to replace that which they sold under the terms of the said mortgage bill of sale and for which the application was made to the County Court Judge.

It appeared that the insolvents long previous to the giving of the bill of sale by way of mortgage (in September, 1879,) had kept their banking account with the claimants and had been allowed to overcheck and had furnished collaterals, and, requiring an increased amount, the bank were willing to grant the same upon being secured. After some negotiations, the insolvents had prepared and executed the bill of sale by way of mortgage to cover the advance they had made and were making and any floating balances that should be due and owing. The bill of sale appears to be dated 1st of September, 1879, though it was not executed until the 15th and was delivered to the bank on the 17th of the same month. The insolvents did not alter their account with the bank, but after the bill of sale was given no paper offered to the bank by the insolvents though weak was rejected, and the insolvents were informed the bank would not honor their checks beyond \$38,000, and this increase was permitted in consequence of the security given. Balance on the 17th September, 1879, \$39,158 20. The bill of sale set forth the facts and was not to be acted upon for one year and then only in case of default in the payment of the sum secured thereby and the interest. The insolvents continued their business with the bank as usual and the bank discounted for the

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insolvents \$128,549. The insolvents continued their business transactions in the usual manner until November 22nd following when they went into the Insolvent Court, and the assignee took possession of their stock-in-trade, and what was covered by the security given to the applicants.

I am unable to see from the statement of facts, for there is no conflict in the evidence, how the learned Judge could find any of the facts which it is urged he should have found. The insolvents got an equivalent and an advance for all they gave to the bank; they employed the moneys in their business, they went on in the usual way, and there is not a particle of evidence to shew that at the time the bill of sale and security was given to the bank insolvency was contemplated, or any doubt was expressed as to their ability to meet all their liabilities. Requiring security for an overdrawn bill is not an unusual thing with the bank, and the insolvents' creditors had the benefit of the funds derived from the bank. The bank though having by the bill of sale security upon their stock and book debts, could not enforce payment under one year. In the meantime they continued in the usual course of their business, the bank discounting paper offered to them—deposits and exchanges up to the time of their stoppage, the 22nd November—the bill of sale by way of mortgage having been given on the 17th Sept. which related back to the 1st of March—the overchecking, which was really advancing by the bank from \$20,318 to \$38,000. The bill of sale, while it was a transfer of the stock in the store or what might be brought in to replace that which was parted with by the insolvents, was only a security for the advances which were not to exceed \$40,000, and the bank could only take what was the advances made by the overchecking by the insolvents' firm.

It was urged by the counsel for the assignee, Mr. Barker, that there was no agreement to make advances for the consideration of the bill of sale by way of mortgage to the bank. I do not concur in this view of the learned counsel. The conversation had with DeVebers and their acting upon it, was an agreement or understanding. Mr. Lewin, the President of the bank, states he with some of the directors, Mr. Yeats and Mr. Gilbert, were appointed by the bank to ascertain how much

money the insolvents required. Upon being informed by Mr. DeVeber what they required and that they would satisfy the bank as to security—he did not state what it would be—the bill of sale recites, the bank “have made *and are making advances* to a certain extent, and for the purpose of securing the bank of all such advances and to cover any floating balances the DeVebers have agreed to give security.” This in my opinion makes a complete agreement, without the evidence of Mr. Stockton, who says that he understood from Mr. DeVeber that the bank was advancing them \$40,000, and that part of the advances were made and that they could not get the balance till they had secured the bank. The bank says to the DeVebers, “we will make the advance and allow you to overcheck, but we must be secured.” The DeVebers make the security to cover the overchecking, and secure the intended future overchecking to a certain amount. I am of opinion there was nothing fraudulent in this. DeVebers had the benefit of the moneys to carry on their business. There is nothing in the evidence to shew that the bank were aware of the DeVebers being insolvent, nor does it appear they were aware themselves that insolvency was likely to occur. It is true they did an extensive business, scattered through the country, and in March, 1879, their balance sheet shewed a large surplus, and that they had other property besides that which they gave the bank security upon. This case bears no resemblance in regard to the facts to the case of *McLeod v. Wright*;¹ there, knowledge of the insolvency of Brown was known to all parties, and what took place was clearly done in contemplation of the insolvency which followed the transfer of the vessel.

The case of *Heath v. Cochrane*² was an interpleader issue tried before Lord Chief Justice Cockburn in 1877. The facts are stated in his Lordship’s judgment. The action was brought by the trustee under the Bankruptcy of one Charles Hole, to try the right of the defendant to retain the proceeds of the bankrupt’s farming stock and effects which had been sold and realized by the defendant under a bill of sale under the following circumstances: The defendant was a money lender who carried on business in London under the name of The National

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¹ 11 P. & B. 68.² 46 L. J. Q. B. 727.

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Deposit Bank. Hole had applied to the defendant and borrowed £200 at the rate of 60 per cent interest, £30 being paid for the six months. Of this loan he paid £115, but before the second instalment became due he applied to the defendant for a further advance of £500. The defendant agreed to make the advance on being paid the £115 due on the previous loan, and on Hole executing a bill of sale of all the effects in his dwelling house and all the stock, implements of husbandry, growing crops and other effects on the farm stock, etc., together with his unexpired interest in the lease which the mortgagee had or might otherwise acquire and have on the said premises or any other to secure the £650 payable by instalments of £81 5s. each. Hole having made default in paying an instalment, the defendant took possession and sold the farming stock and other effects. It was contended on behalf of the creditors that the granting of the bill of sale by Hole amounted to an act of bankruptcy, by reason of which the plaintiff as trustee was entitled to recover the proceeds of the sale. It appeared by the evidence that at the time of giving the bill of sale Hole was hopelessly insolvent; and there was no doubt he was fully aware of the fact. But it equally appeared that his purpose of obtaining a further advance was to go on as long as he could. He did in fact go on buying and selling stock in the usual way for a period of three months. There was no proof that the defendant knew the real state of the bankrupt's affairs. The latter in answer to the defendants' inquiries as to what he owed had stated his debts did not amount to more than £50 exclusive of his rent. No doubt it must have occurred to the defendant that a man willing to pay such exorbitant interest, could not be otherwise than in embarrassed circumstances; but there was nothing to shew the defendant was aware that the state of Hole's affairs was irretrievably hopeless. There being no dispute as to the facts, it was agreed by counsel at the trial that a verdict should be taken *pro forma*, and that it should be left to the Chief Justice to decide whether the giving the bill of sale amounted under the circumstances to an act of bankruptcy so as to entitle the plaintiff to recover. The Chief Justice says:—

“I am unable to distinguish this case from that of *Mercer v. Pater-*

son.¹ There as here was an existing debt and in consideration of that debt and of a further advance, there was an assignment by the debtor of all his personal estate present and future. In that case the Court of Exchequer Chamber held, not without regret, but deeming itself bound by previous decision, that such an assignment was not an act of bankruptcy, inasmuch as the further advance might be the means of enabling the assignor to continue business, and even finally to pay his other creditors. The case of *Lomax v. Buxton*² is also an authority in favor of the defendant. Nor is there any such inadequacy in the sum advanced as should lead to the conclusion that the bill of sale was in fact colorable and intended to secure the antecedent debt so as to bring the case within the decision in *Ex parte Fisher*.³ I regret that such should be law, as I am satisfied when a trader is reduced to the necessity of assigning all his personal property present and future, in order to obtain the means of still going on, nine cases out of ten, the transaction in the result operates to the benefit of the assignee alone, leaving the rest of the creditors unpaid and defeated. * * * But I can only administer the law as I find it, and deeming the present case to be on all fours with *Mercer v. Paterson*, I must decide in favor of the defendant."

This case appears to me to be conclusively in favor of the bank being entitled to claim from the estate of the insolvents under the mortgage bill of sale. Their claim as allowed by the Judge of the County Court, and the giving the bill of sale for an antecedent debt and a further advance, was not an act of bankruptcy, and it covers the goods and merchandise, not only what was on the premises situate in Prince William street in the city of Saint John, but the after acquired property of the insolvents. *Latham v. Amor*⁴ is an authority for this and fully recognized and followed in *Collyer v. Isaacs*.⁵ Hall, V.-C., in giving judgment, says:—

"The frame of the deed is a transfer of all chattels which were on the premises, or which might be thereon, or which might at any time thereafter be brought thereon. That language is unlimited in point of time so long as the relations between the two parties to the instrument subsist. In terms it extends to the property which is at the time thereon, or which may at any time thereafter be thereon—following *Lyde v. Mynn*,⁶ and distinguishing it from *Thompson v. Cohen* and *Cole v. Kernot*.⁷ The Courts of Law refusing to admit its existence for the purpose of transfer, while the Courts of Equity have dealt with these cases as being as effectual transfers of property not existing as they were of what was in existence."

I am of opinion the Banking Acts of the Dominion do not

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¹ L. R. 3 Ex. 304.

² 40 L. J. C. P. 150; L. R. 6 C. P. 107.

³ 7 Ch. App. 686.

⁴ 47 L. J. Q. B. 581.

⁵ 50 L. J. Chancery, 707.

⁶ M. & K. 683; 4 Sim. 506.

⁷ 41 L. J. Q. B. 221.

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invalidate the security given to the Bank in this case. There was a debt due to the bank when the security was given, and is covered by the goods and stock-in-trade. The book debts or accounts will cover the advances or debts subsequently incurred or accruing to the extent of what was then owing, and subsequent advances to the extent in the aggregate of the sums not exceeding \$40,000, for the reasons assigned by the Judge below.

The learned Judge of the County Court has examined the case with the most scrupulous accuracy, has alluded to every fact that was placed before him, and acting upon the authorities to which he refers, and which have not in any way been gainsaid, he has come to the conclusion there was no fraud proved or any matter which tended to shew any unjust preference, or intention fraudulently to impede, obstruct or delay creditors, or in any way defeating the provisions of the insolvent laws, or in any way defeating the provisions of sections 130, 132 and 133.

I am therefore of opinion this appeal should be dismissed, but without costs, as the questions which have arisen involve in some degree questions in apparent conflict between law and equity.

ALLEN, C. J. It having been decided that the Bills of Sale Act, (Consol. Statutes, c. 75), is not *ultra vires*, it follows, that so far as relates to the property professed to be conveyed to the Bank by the bill of sale in this case, no title passed, for want of due registry; but, on the insolvency of Messrs. DeVeber, the title vested in their assignee.

The first section of the Bills of Sale Act declares that every bill of sale of personal chattels, whereby the assignee has power to take possession of any property and effects comprised therein, etc., shall be filed with the Registrar of Deeds of the county where the maker resides; otherwise, as against subsequent purchasers, the assignee of the grantor under any law relating to insolvency, etc., it shall only take effect from the time of filing thereof.

The bill of sale in this case, in consideration of \$40,000 paid to the insolvents, professes to convey to the bank not only the goods and stock-in-trade of every kind belonging to the in-

solvents, but also all book accounts due and owing to them; and one of the questions in this case is whether the non-registry of the bill of sale affects the transfer of the debts. I think it does not. The first section of the Act shews that it was intended to apply only to transfers and assignments of "personal chattels"—property which the assignee could take actual possession of, and which could be levied on under an execution—and not to debts or choses in action, which the assignee could not take possession of. But the sixth section of the Act puts the matter beyond doubt, by defining the meaning of the words "personal chattels" and declaring that they shall not include choses in action. I therefore think that the concluding words of the first section—that the bill of sale as against subsequent purchasers, etc., shall only take effect from the time of filing—do not apply to an assignment of debts. They are not the description of property pointed at in the Act, the secret transfer of which it was intended to guard against, by requiring the bill of sale to be registered.

But though the assignment of the debts is not, in my opinion, affected by the non-registry of the bill of sale, I do not think the bank established a right to them. There was no agreement anterior to the execution of the bill of sale: it amounted only to a proposition on the part of the insolvents to give security on their property, in consideration of the bank agreeing to advance them a certain amount of money, which proposition so far as appears, the bank never agreed to.

It appeared that in August, 1879, the insolvents had overdrawn their account in the bank to the sum of about \$20,000, and they were told by the President that they could not be allowed to draw any further without security. A committee of the Board of Directors was appointed to ascertain what amount of money the insolvents required, and what security they could give. Mr. Boies DeVeber stated to the President that they (the insolvents) would require \$40,000 in addition to the amount then overdrawn, to carry them through till the next summer, and that they would give security, but he did not say what it would be. He took some time to consider about the security; and about the middle of September, brought the bill of sale in question to the bank, and gave it to the Presi-

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dent, stating that it was the security. The President kept it, and at the next meeting of the Directors mentioned what had taken place with DeVeber; but the Board did nothing about the bill of sale, nor did it appear that it was ever laid before them or adopted by them, nor was any communication respecting it made to DeVeber. After this, the bank continued to discount notes for Messrs. DeVeber, the amounts of which were placed to their credit, and they checked against them, and their overdrawn account was increased by about \$19,000. The President stated that that increase was permitted in consequence of their having given the bill of sale.

I am unable to discover any agreement by the bank to accept Messrs. DeVeber's offer. It was not merely to secure the bank for past advances that the security was offered, but it was also to obtain a further advance of \$40,000, to enable them to carry on their business till the next summer. Did the bank ever agree to do this? Could they legally do it? Without the consent of Messrs. DeVeber, they could not accept it as security for the past advances, and reject it as to the future advances. If they did not agree to the terms proposed in their entirety, there was no contract. It was not until the bill of sale was given to the President of the bank, that it was known what security Messrs. DeVeber would offer, or what amount of money they would require; and until the Board of Directors approved of the security, and agreed to advance the amount asked for, and such approval was communicated to Messrs DeVeber, how can it be said that there was an agreement between the parties, binding both of them?

It may be said that the bank continued to discount notes for Messrs. DeVeber after the bill of sale was given, and therefore it might be inferred that they had accepted the offer; but the discounting of notes was not, in my opinion, making "advances" as stipulated for in the bill of sale. Mr. Boies DeVeber in his evidence on this point, says:

"After I delivered the bill of sale, I think I did not get any advances which I considered advances on that bill of sale. We got discounts on notes after that. We were not allowed to overcheck the amount that stood against us on the day I delivered the bill of sale. There was no agreement about discounts that I remember of for the bill of sale. It was understood that the advance of \$40,000 should

be entirely a cash advance; and, as I recollect it, nothing was said about discounts in connection with the bill of sale."

I therefore think the consideration for the bill of sale failed. But whether discounts would be considered as "advances" or not, I think there is no evidence that the bank ever accepted, or assented to the terms of the agreement as proposed by Messrs. DeVeber.

As the bill of sale was not registered till the 5th November, it only took effect from that day, and must be considered as if executed on that day; and, in that case, it would be *prima facie* void under the 133rd section of the Insolvent Act, having been made within thirty days of Messrs. DeVeber's assignment. Undoubtedly the bank would obtain an unjust preference over other creditors by the bill of sale. An unjust preference under this section does not mean a fraudulent preference. *Davidson v. Ross*.¹ A preference is unjust within this section, if it prevents that equal distribution of the insolvents' estate which the Act intended to secure; and the Act declares that an assignment shall be presumed *prima facie* to have been made in contemplation of insolvency, if it is made within thirty days of the issuing of the attachment. DeVebers' had stopped payment before the bill of sale was registered, and there was no evidence to rebut the presumption that it was given in contemplation of insolvency.

The policy of the law is against secret bills of sale, because they tend to deceive persons who deal with the grantor, who assumes to be the owner of property which he has conveyed to another, and perhaps, gets credit upon the strength of the property of which he is the apparent owner. Mr. Lewin stated that he did not put the bill of sale on record, because he did not wish to injure DeVeber's credit; and it was only because he heard that they had given a mortgage of their property, and another bill of sale of their stock, that he did register it. His desire was to avoid publicity. *Ex parte Stevens*.²

For these reasons, I think the bill of sale was inoperative both as to the goods and the debts professed to be assigned; and that the appeal should be allowed.

WETMORE, J. I agree with his Honor the Chief Justice, and

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¹ 24 Grant 22.

² L. R. 20 Eq. 786.

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It seems to me that debts due the maker would not come under the term *personal chattels*, in the first part of this section. The words "property and effects," especially the latter, might have a more extensive signification; unless such extended signification is limited by the Act, which I think is the case. The bill of sale legislated upon, is to be of *personal chattels* whereby the assignee shall have power to take possession of property and effects comprised in or made subject to such bill of sale. The term "effects" might include a description of property not included under the term "chattels;" but the bill of sale to be affected by the Act must be a bill of sale of *personal chattels* that the assignee can take possession of; and possession could not be very well taken of a debt due the maker of the bill of sale. At the end of section 6, a meaning is given to the expression "personal chattels:" it shall mean goods, furniture, pictures, and other articles capable of complete transfer by delivery, and shall not include chattel interest in real estate, nor shares nor interest in the stocks, funds, or securities of any government, or in the capital or property of any incorporated or joint stock

company, nor choses in action. All this is a very long way from including debts. The Act may possibly extend to property that can be taken under process of law by a sheriff, constable, or other person. Section 11 of cap. 47 specifies exactly what may be taken under a *fi. fu.*: namely, money or bank notes, (including notes commonly known as Dominion currency), or other currency, and any checks, bills of exchange, promissory notes, bonds, specialties, or other securities for money; debts are not included. Apart from the Act, the property could have been transferred, so as to preclude all the class of claimants protected by the Act, as well without registering as with it; and in construing the effect of its requirements, the Court should not extend its terms beyond what the Act clearly specifies. The non-registry would only affect that description of personal property to which the Act extends, and would not affect a description of property not within its terms, as debts.

If the bill of sale transferred personal chattels, and was also an assignment of debts (which it is in the present case), while the non-registry would invalidate it as to subsequent purchasers, etc., so far as regards personal chattels, the assignment of debts would not be interfered with, whether the bill of sale was registered or not. I think the Bills of Sale Act does not apply to an assignment of debts. I would also refer to *Ex parte Dann*,¹ as to the necessity of there being a complete agreement, binding on both parties, as well upon the bank as upon the DeVebers.

DUFF, J., concurred in the judgment of ALLEN, C. J.

KING, J., having been counsel in the cause, took no part.

Appeal allowed with costs.

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¹L. R. 17 Ch. Div. 28.

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LEIGHTON v. DEERING.

*February.**Woodstock (Town of)—Civil Court—Review.*

The proceedings by review under Consol. Stat., cap. 60, do not apply to a judgment in the Civil Court of the town of Woodstock under Act 43 Vic., cap. 48, sec. 10.

The question in this case was, whether the proceeding by review under the Act relating to proceedings before Justices of the Peace in civil suits (Consol. Stat. cap. 60) is applicable to cases tried under the Act 43 Vic. cap. 48, authorizing the appointment of a Police Magistrate for the town of Woodstock. The case was referred to the Court by Mr. Justice Weldon, to whom application had been made for an order for review.

February 8th, 1882. *Wetmore, Q. C.*, for the plaintiff referred to *Ex parte Moore*.¹ [PALMER, J. That case was decided under the Portland Police Act, 34 Vic. cap. 11. The words in the section (99) of that Act regulating the proceedings in civil cases are not exactly the same as the words of the 10th section of 43 Vic. cap. 48.] I submit they mean substantially the same thing, and neither of them provide an appeal by way of review.

Cur. adv. vult.

The judgment of the Court was now delivered by

ALLEN, C. J. We think this case cannot be distinguished from *Ex parte Moore*.

The 10th section of the Act 43 Vic. cap. 48, which authorizes the appointment of a Police Magistrate for Woodstock, after declaring that he shall, in addition to his jurisdiction as a Justice of the Peace under the provisions of cap. 60 of the Consol. Statutes, have civil jurisdiction in the County of Carleton in certain specified cases, enacts as follows: "All proceedings and trials under this section, shall be had and taken in every respect under the provisions of said chapter 60, or any amendments thereto."

It is the proceedings before the Police Magistrate under the above section—the prosecution and trial of cases over which jurisdiction is given to him—which are to be regulated by chapter 60. Any subsequent proceedings by way of appeal from his judgment before another tribunal, are not provided for. We therefore think the order should be refused.

¹1 Pug. 333.

THE SAINT JOHN & MAINE RAILWAY CO., APPELLANTS,
 AND
 MONTGOMERY, RESPONDENT.

1882.

March.

*Railway Company—Liability to fence—Occupier of adjoining land—
 41 Vic., cap. 92, sec. 22.*

[County Court Appeal.]

By Act 41 Vic., c. 92, sec. 22, a railway company were bound to erect and maintain sufficient fences on each side of their line where it passed through enclosed or improved land, and were made liable for all damages sustained by reason of neglect to maintain such fences. Plaintiff's cow strayed from his land into the highway, and thence into land belonging to H. adjoining the railway, and from thence out upon the railway track through a defective fence, and was killed by a train, but without any negligence in the management of the train.

Held, that the obligation to fence was general, and not merely as against the occupiers of land adjoining the railway; and that the company were liable for killing the cow.

This was an appeal from a judgment of the Judge of the County Court for the City and County of Saint John, refusing a new trial in a case tried before him at St. John in January, 1881. The material facts as they appeared on the trial were that the appellants, a railway company, were bound by Act 41 Vic. cap. 92, sec. 22, to erect and maintain substantial, legal and sufficient fences on each side of their line where it passed through enclosed or improved land, and were rendered liable for all damages sustained by reason of their neglect or failure to maintain such fences. The respondent owned land bounded by the highway near to, but not adjoining the appellants' railway. The land between the highway and railway belonged to one Hayes, and was improved land. There was a private lane through Hayes' land, extending from the highway to the railway, with bars at each end of the lane. At the time the accident occurred, both these bars were down, and the fence between Hayes' land and the railway track was defective in several places. The respondent's cow strayed from his land into the highway, and into the land of Hayes, and from thence passed out upon the railway track through the defective fence and was killed by a passing train, but without any negligence in the management of the train. Verdict for the plaintiff—damages \$40.

October 24th, 1881. *E. L. Wetmore* for the appellants. Under 41 Vic. cap. 92, sec. 22, the appellants incurred no liability, statutory or otherwise. The duty imposed by that

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Act is, to fence against the owner or occupier of the adjoining land only. The respondent's cow was wrongfully on the land of Hayes, from whence she passed upon the railway track. If the statute does not create a duty to fence against the general public, all the authorities shew the appellants are not liable in this case: *Ricketts v. E. & W. India Docks & Railway Company*; ¹ *Maynard v. Boston and Maine Railroad*; ² *Eames v. Salem & Lowell Railroad*; ³ *McDonnell v. Pittsfield North Adams Railroad*; ⁴ *Dawson v. The Midland Railway Company*.⁵

If the company were liable to fence as against the respondent, there was a question of contributory negligence which should have been left to the jury. It was negligence for the respondent to leave his bars open leading to the highway, as he must have known that his cow was liable to stray out on the highway and from that to the railway.

McMillan, contra. If the Court should be of opinion that the company's liability to fence is not confined to owners of land adjoining their railway, then the authorities cited have no application; for they only decide that railway corporations are not liable for injuries to the animals of persons who are not adjoining owners or occupiers of lands, if their animals, while trespassing upon lands of adjoining owners, have got upon the railway. Those cases appear to have all been decided under Acts which expressly confine the liability to fence to the owners and occupiers of adjoining lands. Section 22 of 41 Vic. cap. 92 is general in its terms, and imposes a duty upon the appellants to protect the whole community, by fencing their line on both sides where it passes through improved lands. Acts of this kind should be construed strictly against the parties obtaining them, but liberally in favor of the public: *Parker v. The Great Western Railway Company*.⁶ The company cannot set up as an excuse for their breach of duty, an unlawfulness as against a third person who does not complain. The cow was lawfully on Hayes' land, as against the company. Hayes made no objection, and it must be presumed as against the company, that she was there with his leave and license:

¹ 112 C. B. 100.
² 115 Mass. 458.
³ 98 Mass. 500.

⁴ 115 Mass. 504.
⁵ L. R. 8 Exch. 8.
⁶ 7 M. & G. 253.

Fawcett v. York and North Midland Railway Company;¹ 1882.
Browne v. Providence, Hartford and Fishkill Railroad Co.;² THE ST. JOHN
Rogers v. Newburyport Railroad Company;³ Sharrod v. AND MAINE
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There was no contributory negligence. Admitting the respondent was guilty of negligence as against Hayes in not keeping up the bars between his own close and the highway, there was no negligence as respects the company; for he had a right to assume that their fences were not defective. Even notice that the cow had escaped before and had been upon the track would be immaterial: *Rogers v. Newburyport Railroad Co.* The act of the respondent was not the necessary, or even the probable cause of the damage, and if it contributed to the injury at all, it was too remote to amount to contributory negligence. Add. Torts (4 ed.) 21, 189,

Wetmore, in reply. In construing the statute imposing the duty of fencing the railway, the Court should look at the circumstances of the country. The fact that the provision for fencing is confined to improved lands, tends to shew that it was the intention of the Legislature to extend the protection to adjoining occupiers only. Cattle are much more likely to be running at large in wilderness land, than on improved land. In this view of the case, *Fawcett v. York and North Midland Railroad Company* does not apply. It was only necessary that the company should reasonably maintain the fences. It might be that the bars were down by the default of a third person, or by agreement with the adjoining proprietor.

Cur. adv. vult.

The following judgments were now delivered:

WELDON, J. This is an appeal from the County Court of Saint John. The action was for killing a cow of the respondents by the Railway Company. The cow had strayed from the respondent's land into Hayes' land, and got on the railway through the defect, as it was alleged, of the fences: the appellants contend it was through the bars of the fence being down on a lane running out on the railroad.

There is no common law liability to fence, either as respects

¹18 Q. B. 610.
²12 Gray 55.

³1 Allen, 18.
⁴4 Exch. 590.

1882. the highway, or as respects adjoining proprietors. The liability of the appellants arises by the Act of Assembly 41 Vic, cap. 92, sec. 22, which enacts as follows :

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"The company hereby created, shall erect and maintain legal and sufficient fences on each side of the land held by them for their railway, where the same passes through enclosed or improved land, or lands that may hereafter be enclosed, or improved, and for neglect or failure to erect and maintain such fences, the said company shall be liable for all damages sustained by reason of such neglect or failure."

By this section the company are, as stated, bound to fence on each side of their railroad, not only against the adjoining proprietor, but to fence their railroad with a legal fence, to prevent cattle coming on the railroad track. I am of opinion also that the fence in question must have been found by the Jury not to have been sufficient, or such a fence as the law requires: if it was necessary to have bars in the fence for any purpose, they must take care of them; the Act makes no exception. It was contended that the cow having escaped from the respondent's field into Hayes' field, which adjoined the railway, the appellants were not liable; or if the cow strayed through the bars to the railway the company were not liable. I am of opinion this contention cannot be sustained: the Act negatives this. The obligation on the part of the company is to maintain legal and sufficient fences on each side of their road; there is no exception in regard to bars or gates, nor individuals holding land not adjoining the railroad. It would be of no consequence whether there was a fence between the respondent's and Hayes' land, the obligation of the appellants is not relieved thereby, nor by the bars being down: there was no obligation on the part of the respondent to keep the bars up. In *Ricketts v. E. & W. India Docks & Ry. Co.*¹ the plaintiff's sheep escaped into the field of A. from defect of fences, which the plaintiff was bound to repair, and from thence upon the railway track by reason of a defect in the railway fences: the railway company were held not liable. In *Lawrence v. Jenkins*,² the Court held that as the true nature of the prescription is that the defendant was bound at his own risk to have a sufficient fence always existing, he was liable to the plaintiff for the damage which he sustained, notwithstanding he had no knowledge of the injury done to the fence. In

¹ 12 C. B. 160.

² L. R. 3, Q. B. 274.

Dawson v. The Midland Railway Co.,¹ the Railway Company were held liable for killing a mare which escaped from the stable, passed into a field, and thence through a gap in the fence on the defendants' road, where she was killed by a train of the defendants. The defendants admitted that they were bound under the statute to repair the fence as to owners and occupiers, but not as to the plaintiff. The Court held the company liable under the statute. The statute enacts as follows:

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"The company shall make, and at all times further maintain the following works for the accommodation of the owners and occupiers of lands adjoining the railway."

Our Act of Assembly does not confine the making of the fence and maintaining of the same to owners or occupiers, but generally the obligation is to make and maintain legal and sufficient fences on each side of the railroad, and for any neglect or failure causing damage, the company are liable.

I am of opinion the judgment of the County Court must be affirmed.

WETMORE, J. I see no objection to the charge of the learned Judge. The company are bound to erect and maintain substantial, legal and sufficient fences on each side of the land held by them for their railway, where the same passes through enclosed or improved land, or lands that may hereafter be enclosed or improved; and for neglect or failure to erect and maintain such fences the company shall be liable for all damages sustained by reason of such neglect. This is the contract made with the public. *The River Wear Commissioners v. Adamson*.² The company get, or expect to get advantages and benefits by reason of their charter, and for the privileges thereby acquired undertake to keep up the description of fence stated in the Act, and assume the responsibility of any damages sustained by reason of neglect or failure to keep up such fences. The liability of the company was thus left to the jury. The question of contributory negligence was also left to the jury. One main ground of defence was that the responsibility of fencing was only between the company and the adjoining owner or proprietor; and *Dawson v. Midland Railway Company*³ was cited, where it was held that a plaintiff was

¹L. R. 8 Exch. 8.²L. R. 2 App. C. 748.³L. R. 8 Exch. 8.

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entitled to the benefit of 8 & 9 Vic. cap. 20, sec. 68, whereby railway companies are bound to maintain sufficient fences for the protection of the cattle of the "owners or occupiers" of land adjoining their line, and that the defendants were therefore liable. Kelly, C. B., says:

"The plaintiff's horse was lawfully in the field from which it escaped through defect of the defendants' fences. It is said that the statutory duty is only imposed on the defendants as far as regards 'owners or occupiers' of the adjoining land. But here we must take it that the horse was upon the close with the license of the occupier; and that being so, in my judgment the defendants are liable."

Bramwell was of the same opinion: he said—

"The statute appears to me to be for the benefit of all persons who are lawfully using adjoining land."

What is there to shew the plaintiff's cow was not lawfully in the field from which she escaped to the track, by reason of defect in the fences that the defendants were bound to keep up? But our Act does not confine the liability between the company and owners or occupiers. The undertaking is general, to keep up the required description of fence; and the liability is generally for all damages sustained by reason of such neglect or failure. If the plaintiff's cow was trespassing, that is a matter between the owner of the land and plaintiff. I cannot see what it has to do with the defendants' liability to the plaintiff by reason of defect in fences that they were bound to keep up. The simple question is was the injury to the cow caused by the defect in the fence, whether the cow was rightfully or wrongfully on the land adjoining the railway? The jury have found that it was, under, in my opinion, a correct charge from the learned Judge. Whether the cow went through the bars or not, so far as regards the defendant's liability to the plaintiff, in my opinion makes no difference. I see no reason why the verdict should be interfered with.

KING, J. The facts as far as material are that the respondents' cow strayed from his land (he not being an owner of land adjacent to the railway) into the highway, and thence into land adjoining the railway belonging to one Hayes, and from thence passed out upon the railway track through a defective fence, where she was killed by a passing train, but without any negligence in the management of the train. It was assumed

on the argument that (apart from any question of contributory negligence) the damage was sufficiently the consequence of the defect in the fences to render defendants liable under the statute, if the statute extends to cover damage sustained by a person not being an owner of land adjoining the railway: but it was contended for the appellants that the liability under the Act is limited to damages sustained by the owners of adjacent land, for whose benefit alone it is contended the obligation to fence was imposed. The Act in question incorporates the appellant company, and authorizes them to purchase the railway and property and franchises of the company commonly known as the Western Extension Railway Company. Section 21 grants to them a toll upon passengers and freight, in case they make the purchase. And then section 22 is as follows:

"In case of the purchase of the said railway and property as aforesaid, the company hereby created shall erect and maintain substantial, legal and sufficient fences on each side of the land held by them for their railway, where the same passes through enclosed or improved land, or lands that may hereafter be enclosed or improved, and for neglect or failure to erect and maintain such fences the said company shall be liable for all damages sustained by reason of such neglect or failure; provided, however, that such fences may be dispensed with at the receiving and landing places of passengers and freight, and at such other places as fences are not elsewhere usually required."

This section, like the corresponding clause in the Act 27 Vic. cap. 42 incorporating the Western Extension Railway Company, to whose rights this company succeed, and like the corresponding clause in all the railway Acts passed by the Legislature, is not found in connection with clauses that deal with the acquisition of land for railway purposes and with the rights of adjoining proprietors. Then the obligation to fence is not expressed to be for the benefit of the adjacent land owner or of any particular class, but is general in its terms. In *Eames v. Salem & Lowell Railway Company*,¹ cited by the learned counsel for the appellants, the duty to fence was declared by the Act to be for the benefit of adjacent land owners and of travellers by the road; and in *Dawson v. Midland Railway Company*² it was expressed to be for the accommodation of the owners and occupiers of lands adjoining the railway. The section here does, no doubt, operate to the

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¹98 Mass. 560.²L. R. 8 Exch. 8.

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benefit of adjacent land owners as such, as it relieves them from any liability to contribute towards the cost of fencing that would otherwise be imposed by virtue of the general law as to fencing enclosed or improved land. But although it thus operates to their benefit, it is not necessarily imposed solely for their benefit. Apart from the provisions of the statute, the railway company would have no greater or other liability to adjacent land owners than to any other persons in respect of damages to cattle occasioned by the running of the trains. The liability of the company for such damage would be determined entirely irrespective of whether the person sustaining the damage were or were not an adjacent land owner. In the absence then of anything in the Act clearly shewing that the obligation to fence was imposed for the benefit of the adjacent land owner, or of him and of any other particular class, or that the damages recoverable for neglect to fence are damages sustained only by him or any other particular class, I think that the obligation must be considered as of a public character for the benefit of whom it may concern. Such seems to be the way in which like provisions in other railway Acts are regarded by the Legislature. The Act 27 Vic. cap. 42 and all the railway Acts prior to this Act treat the obligation to fence as a public obligation, by making the neglect punishable on indictment. The omission from this Act of the reference to proceedings by indictment probably arose from its being considered that the providing for proceedings by indictment is not within the competence of the local Legislature. It may also be a question whether the appellant company are not bound to fence under the provisions of the clause to that effect in the original Western Extension Act. Furthermore, the proviso excepting the receiving and landing places of passengers and freight seems to me to shew that the obligation to fence imposed by the Act is not simply an enactment affecting the relations of the company and other land owners as adjoining proprietors. Then it is said that as the plaintiff's cow was wrongfully on the land of Hayes, the plaintiff is not entitled to recover. *Fawcett v. York & North Midland Railway Company*,¹ cited by Mr. McMillan, shews however that if the obligation to fence is a public one,

¹ 16 Q. B. 610.

the fact that the plaintiff is (as between himself and third parties) wrongfully on land outside the railway track is wholly immaterial. In such case he is not a wrongdoer towards the defendant, whatever he may be towards the third person.

As to the other question argued, viz., that relating to contributory negligence, I think the case was left to the jury properly and that they properly found on it.

ALLEN, C. J., DUFF and PALMER, JJ., concurred with KING, J.

Appeal dismissed with costs.

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THE QUEEN v. THEAL.

[Crown Case reserved.]

1882.

March.

Indictment—Misjoinder of counts—Evidence—Amending reserved case.

An indictment contained two counts, one charging the prisoner with murdering M. J. T. on the 10th November, 1881; the other with manslaughter of the said M. J. T. on the same day. The Grand Jury found "a true bill." A motion to quash the indictment for misjoinder was refused, the counsel for the prosecution electing to proceed on the first count only.

Held (PALMER, J., dissenting) that the indictment was sufficient.

The prisoner was convicted of manslaughter in killing his wife, who died on the 10th November, 1881. The immediate cause of her death was acute inflammation of the liver, which the medical testimony proved might be occasioned by a blow or a fall against a hard substance. About three weeks before her death, the prisoner had knocked his wife down with a bottle: she fell against a door, and remained on the floor insensible for some time; she was confined to her bed soon afterwards and never recovered. Evidence was given of frequent acts of violence committed by the prisoner upon his wife within a year of her death, by knocking her down and kicking her in the side.

Held per ALLEN, C. J., WELDON, WETMORE, DUFF and KING, JJ., (PALMER, J., dissenting), that there was evidence to leave to the jury that the disease which caused her death was produced by the injuries inflicted by the prisoner, and that the evidence of violence committed within a year of the death was properly received.

Where it was objected at the trial that there was not evidence against the prisoner to leave to the jury, but the Judge was not asked to reserve the point, the case reserved was allowed to be amended at the argument, in order to raise the point. (WELDON and WETMORE, JJ., dissenting.)

This case was tried before Allen, C. J., at the St. John Circuit, in November last, and the following case was reserved under the Statute (Consol. Stat. p. 1088) for the consideration of this Court:

The prisoner was convicted of manslaughter at the Saint John Circuit in November last, on an indictment containing two counts.

The 1st count charged that he did on the 10th November, 1881, at the Parish of Lancaster, feloniously, wilfully, and of his malice aforethought, kill and murder one Mary Janet Theal.

The 2nd count charged that he did on the 10th November, 1881,

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at the Parish of Lancaster, &c., feloniously and wilfully kill and slay the said Mary Janet Theal.

When the prisoner was arraigned, and before he pleaded, his counsel moved to quash the indictment on the ground of the misjoinder of the counts for murder and manslaughter, and that the finding of the Grand Jury "A true bill," was uncertain. The counsel for the prosecution having elected to proceed on the count for murder only, I refused to quash the indictment, and the prisoner pleaded "not guilty." In opening the case, the counsel for the prosecution stated that he would prove the ill-treatment of the deceased by the prisoner for a considerable time before her death; that his systematic abuse brought her to the condition which caused her death; that he had beaten her on the 17th October last, and that she died on the 10th November.

The evidence shewed that the prisoner was in the habit of using violence to the deceased, by knocking her down and kicking her on different occasions, for more than a year before her death, which took place on the 10th November last.

One witness testified that the deceased had sent for her in October last, she could not state the day; that she found the deceased ill in bed, her left eye black and bloodshot, and complaining of pain in her back and right side. That she asked deceased in presence of the prisoner what caused her black eye, to which she answered that the prisoner wanted her to get out of bed and get him a bottle of beer; that she (deceased) said she was tired and told him to get it himself; that he got out of bed and went for the beer; that she got up and followed him; that he met her in the door and hit her with a bottle; that she fell over against the door and did not know any more about it till she came to; that she did not know how long she lay there; that she got up and crawled into bed in the morning. That the witness asked the prisoner the cause of his doing this, to which he answered that he did not recollect doing it. This witness visited the deceased frequently between that time and her death, sometimes remaining with her during the night, and during the principal part of the time the deceased was unable to sit up, and complained of great pain. Other witnesses proved that the prisoner knocked the deceased down and kicked her at different times, one in June or July 1880, others in September and December, 1880; another in January or February, 1881; another in March, 1881, and between April and July, 1881. Some of the witnesses swore that he kicked her in the side; and that on two occasions when he was beating her, he swore that he would take her life if he was hanged for it. It was also proved that in consequence of his violence one night she was obliged to leave the house, and remained in the barn all night. The evidence of the assaults was given after the medical testimony, and was received subject to objection by the prisoner's counsel, that no evidence could be given of assaults prior to the 10th November when Mrs. Theal died; or at all events prior to the 17th October, as stated by the counsel for the prosecution in opening the case.

Dr. White, who visited the deceased at the request of her brother on the 26th October, prior to her death, stated that he found her in

bed, that she complained of severe pain and soreness in her right side and tenderness on pressure directly in the region of the liver. That he visited her again on the 7th November and found all her symptoms considerably aggravated, the pain in her side greater than before, more fulness, and extending more over the liver, and her pulse much more rapid than on the 26th October. That she was very weak and complained of pain in the region of the liver, extending from the region of the right to the left lobe, and at that time he considered her condition very critical. This witness made a *post mortem* examination the day after Mrs. Theal's death, with the assistance of Dr. McFarlane. He stated that there was a great deal of fulness on the side of the deceased extending from the right side over to the left in the region where she complained of the pain, that the condition of the liver was unusually large, about twice its natural size; that they examined the liver very carefully and found it much darker than its natural color, very soft and breaking down with the slightest pressure of the finger, particularly the right lobe, indicating that it was very much disorganized and had undergone a high degree of inflammation, and that as it broke down a peculiar fluid issued from it, which though not pure pus, they concluded contained pus matter; that their opinion was that the disease of the liver was the immediate cause of death, and that they believed the disease of the liver to be acute, and thought the disease was of three or four weeks duration; that they did not notice any indications of chronic disease in any of the vital organs; that a blow or a fall on a hard substance might cause the acute inflammation of the liver; that inflammation would cause the appearance of the liver which they found. That in his experience, cases of acute inflammation of the liver were not common in this climate.

On cross-examination he stated that he could not say positively what caused the inflammation of the liver of the deceased; that a change of temperature might cause it, by a person being overheated and then exposed to a lower degree of temperature; that extreme heat might cause it, and it was very common in tropical climates. That they found no mark on the right side of the abdomen over the region of the liver. That a blow might be received in the abdomen which would cause death without producing any local manifestation, and he believed a blow could be given which would cause inflammation of the liver without producing any external mark.

Dr. McFarlane, the other medical witness who assisted at the *post mortem*, stated that they found the liver much larger than in a normal state, that it was very much softened and broke easily on pressure, and when separated a large quantity of brownish fluid flowed out, in which in his opinion there was pus; that it had undergone a process of disintegration, shewing that serious structural changes had taken place, exhibiting that the liver was in an advanced stage of inflammation; that he considered the immediate cause of death was acute inflammation of the liver: it had probably lasted for two or three weeks; that acute inflammation was caused in tropical climates by using alcoholic stimulants; that it was not a common disease in the temperate zone; that he thought it might be caused by a kick or blow, or external violence without leaving any external mark.

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On cross-examination, he said that he did not know how the inflammation of the liver was caused; that it would not be remarkable in this case that there were no external marks of violence; that he had known cases of persons receiving injuries in the abdomen without any external marks; that the injury which would cause the state of the liver they found, might have remained eight or nine weeks; that in ordinary cases pus begins to form in two or three weeks after the inflammation commences; that a patient would feel pain very soon after acute inflammation commenced; that acute inflammation would be likely to run its course in from eight to ten days; that in his opinion inflammation of the liver as they found it, would be more apt to be caused by external violence than by other causes; that the effects of food, a heavy meal, might cause inflammation; that pus begins to form between two and three weeks after acute inflammation.

I directed the jury to consider: 1st. Whether inflammation of the liver was the immediate cause of Mrs. Theal's death; and 2nd, If it was, was such inflammation produced by natural causes, or by injuries and violence inflicted by the prisoner. If the cause of death was inflammation of the liver, and that was produced by a series of acts of violence committed by the prisoner, at least, if they were committed within a year of the death, the crime would be murder or manslaughter according to circumstances, though no one act of violence by itself would have produced that result. I directed them to exclude from their consideration, evidence of assaults committed more than a year before the death. I explained to the jury the principles which would distinguish murder from manslaughter. The questions which I reserved for the opinion of the court are—

1st. Whether the indictment should have been quashed for the reasons before stated.

2nd. Whether the evidence of assaults and violence committed by the prisoner upon the deceased, prior to the 10th November or the 17th October, 1881, was properly received.

3rd. Whether there was any evidence to leave to the jury to sustain the charge in the first count of the indictment.

(On this point it was understood that all the evidence might be referred to.)

February, 1882. *Blair* moved to arrest the judgment. The counts ought not to have been joined in the indictment. They charge totally distinct offences, and the prisoner could not be found guilty of both. It does not help the matter that the crown officer elected to proceed on the count for murder. They should only have been allowed to proceed for the lesser offence. [KING, J. In *Reg. v. Strange*¹ it was held that the indictment might contain counts charging different offences, although the judgment on the several counts differed.] That case may depend on the statute under which the prisoner was indicted.

On this finding, it is impossible to say which of the offences the grand jury intended to put the prisoner on his trial for. It cannot be said that they found that he had committed both murder and manslaughter against the same person; that would be absurd. Both the facts found could not exist, and the court cannot apply the finding to either one or the other: Arch. Crim. Pl. & Ev. 70.

The evidence of assaults a year and a half previous to the death of the woman were clearly inadmissible. [ALLEN, C. J. I withdrew from the consideration of the jury any evidence of assaults which occurred more than a year prior to the death.] I submit that any evidence of assaults prior to the 17th of October, at which time the woman was shewn to be in her usual good health, was improper: it could only be presumptive evidence of malice, and was improper, at all events until it was established that death was caused by the prisoner's violence. The prosecution never laid any foundation for this evidence. It was proved that the death was caused by acute inflammation of the liver, and if that was caused by violence it could only be by recent violence: Rosc. Crim. Ev. (ed. 1875) 655. There was not a tittle of evidence to leave to the jury that death was caused by the ill treatment of the prisoner. [SOL. GEN. That point was not reserved.] It was taken on the trial. [ALLEN, C. J. The point was taken at the trial, but I was not asked to reserve it. If the Court think I ought to amend the return by reserving the point, I will do so. WETMORE, J. I think the prisoner's counsel should have asked to have the point reserved at the trial.] If the point was taken at the trial, the prisoner should have the benefit of it. [WELDON, J. I do not think it is a point which could be reserved under the statute; but if it could, I think it is too late now. ALLEN, C. J. I think the point is open to you.] [The rest of the Court concurring the case was amended on this point.] If death was caused by a blow at all, it must have been by a blow in the region of the abdomen. The only evidence of any blow given by the prisoner at a time when death could have been the result, was a blow on the head with a bottle. It is not pretended that the death was the result of this blow. [ALLEN, C. J. What evidence was there of other causes than violence contributing to the

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1882. death?] It does not appear that the disease could only have
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Solicitor General, contra. The authorities all go to shew
 . that there is nothing in the first point, and that there is no
 objection to charging several offences in different counts in
 an indictment, though it may be that the prosecution will be
 compelled to elect upon which count he will proceed, if the
 Judge trying the cause thinks that the prisoner is likely to be
 embarrassed in his defence by reason of the several counts:
 and whether the prosecution will be put to the election, or not,
 is a matter entirely within the discretion of the presiding
 Judge: Arch. Crim. Ev. (ed. 1875) pp. 74, 75; *Reg. v. Strange*;¹
Reg. v. Downing;² *Reg. v. Trueman*;³ *Reg. v. Davis*;⁴ *Rex v.*
Folkes;⁵ *Rex v. Johnston*;⁶ *Rex v. Austin*;⁷ *Reg. v. Pulham*;⁸
Rex v. Kingston.⁹

The evidence of ill treatment prior to the 17th October was
 properly received to shew the prisoner's intention: Arch. Crim.
 Ev. 226, 227; *Rex v. Joice*;¹⁰ *Rex v. Hagan*;¹¹ *Reg. v. Dossett*.¹²

There was sufficient evidence to justify the learned Chief
 Justice in leaving the question to the jury whether the death
 was caused by the prisoner's violence. [The *Sol. Gen.* referred
 to the evidence on this point.] All the evidence goes to shew
 that the woman's death was caused by the ill usage of her
 husband; but I submit that if the case stood alone on the
 statement of the deceased made in the prisoner's presence, and
 which was not denied by him, that he struck her on the head
 with a bottle, and she fell against the door and lay on the floor
 for a considerable time, that that taken in connection with the
 evidence of the immediate cause of the death, would be a case
 which the Judge would be bound to leave to the jury.

Cur. adv. vult.

The following judgments were now delivered:

PALMER, J. The prisoner was indicted and tried at the
 Circuit Court for the City and County of Saint John before the
 Chief Justice in January last. The indictment contained a
 count for the *murder* of the prisoner's wife, and also a second
 count charging him with *manslaughter* in killing his said wife.

¹⁸ C. & P. 172.
²² C. & K. 882.
²⁸ C. & P. 727.
²⁹ F. & F. 19.

³ Mood. C. 354.
⁶ Lea. C. C. 1103.
¹⁷ C. & P. 796.
²⁹ C. & P. 230.

⁹⁸ East. 41.
¹⁰⁸ R. & R. 531.
¹¹¹² Cux. C. C. 257.
¹²² C. & K. 202.

The prisoner's counsel, before plea, moved to quash the indictment, and before trial to compel the Crown to elect on which count they would proceed.

The learned Chief Justice denied the former of these motions, but reserved the point for this Court. He also reserved the question whether there was any evidence to be left to the jury of the prisoner having killed his wife, and then left the fact whether he so killed her to the jury, who found him guilty of manslaughter. Therefore the case presents the following points of law : *First*, whether this indictment which, in the first count charges that the prisoner is guilty of murder, and killed his wife with malice aforethought, and in the second finds that he is guilty of manslaughter for killing the same person is so repugnant and contradictory as to be bad, or that it is a misjoinder, and therefore bad. *Second*, whether there was any evidence that the prisoner killed his wife, that the Chief Justice should have left to the jury. I have come to the conclusion that the contention of the prisoner's counsel was right on both points.

The first principle of law I need notice is the fundamental one "that no person can be tried for any crime until an information is laid against him charging him with having committed it, or a Coroner's or Grand Jury have by their oaths found that he has committed it, and they have so presented in unequivocal language." Then, does the finding of this Grand Jury in this indictment taken altogether, charge any, and if so, what crime against the prisoner? Or is it so repugnant and contradictory that the Court to whom the presentment was made could not tell with any reasonable certainty what crime they really found the prisoner had committed? Is it that he murdered his wife? This is distinctly found by the first count, but is distinctly denied by what is as distinctly found in the second count that by the same killing he committed manslaughter; for if so, it could not be murder. It is, I think, impossible that all the facts found in both these counts can be true, for when the jury found that the prisoner was guilty of manslaughter in killing his wife, they found he was not guilty of murder in so doing and *vice versa*.

It is impossible that the jury could have believed that the

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one killing was both murder and manslaughter, or that the prisoner again killed his wife after he murdered her. It follows that no Court can tell which of these crimes the jury really believed the prisoner guilty of. If this is so, it is the clearest repugnancy, and the indictment is bad.

In Comyns' Digest, Title Pleader, C. 22, it is laid down that an indictment ought to be framed so as to convey to the party charged a certain knowledge of the crime imputed to him; again, if a declaration be repugnant or insensible it is bad. The rule is well laid down in Archibald's Crim. Pleading and Evidence, page 70, as follows: "When one material part of an indictment is repugnant to another, it is bad." The reason is, not that one count or the other would be bad by itself, or that there is any difficulty about the trial or judgment, but because when the jury find that two material facts exist so inconsistent that they cannot both by any possibility exist, no person can tell which of these facts the jury intended to find, and therefore there is no proper finding at all. It has been suggested that the words in the second count, stating that the killing in that count was the same person named in the first count might be struck out, and then the Court might infer that the jury intended to charge the prisoner with killing another person and then there would be no repugnancy; but I cannot conceive any court altering a presentment so as to make it say anything different from what the jury themselves have said, if any authority is wanted for so plain a proposition it will be found in *Regina v. Craddock*.¹ It can not be said in this, as was said in that case, that these two counts are conceivably both capable of proof. Alderson Baron in the case of *Regina v. Downing*,² says "that if you were to take the second count literally, it is bad, because the first count charges that two persons killed a man: and that afterwards the same two persons murdered the same man, which is that they murdered the dead man." In this case the first count charges that the prisoner murdered his wife, and the second count finds that he afterwards killed her and thereby committed manslaughter. That is, again killed the murdered person.

The rule of construction is the same, both with regard to the

¹30 L. J., M. C. 81.

²2 C. & K. 202.

finding in an inquisition, and the finding by the petit jury; then suppose the petit jury had in this case found the prisoner guilty on both counts, would not this be bad? It would be that the prisoner murdered his wife and afterwards killed her, that is killed the murdered person. In order to make the last finding to be true or possible, it is apparent that the first finding must be false, and what is that but the jury finding a fact to exist, and then in the same document distinctly finding that it does not exist? In such a case all I can say is that they have not found the fact.

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On the other point I have come to the conclusion that there was no evidence that the prisoner killed his wife, that the Chief Justice should have left to the jury. The evidence of both Doctors White and Macfarlane was, *that acute inflammation of the liver* was the cause of her death, and there was not the slightest evidence or pretence in the case that it resulted from any other cause. It follows that to make the prisoner answerable it must be proved that he caused such inflammation.

Dr. White says he and Dr. Macfarlane held a *post mortem* examination—did not find any local bruises except a small discoloration on the left arm and two small ones on the abdomen near the umbilicus. A blow or fall on a hard substance might cause acute inflammation of the liver. This disease is not common in this climate. I cannot state positively what caused this inflammation—changes of temperature might cause it; by a person being overheated and then exposed to a lower temperature. Extreme heat might cause it. Perhaps *mercurial purgatives* might cause it. *I found no marks on the right side in the region of the liver. The two spots on the abdomen were not in the region of the liver.*

Dr. Macfarlane says that he assisted at the *post mortem*; found no abnormal appearances on the right side externally:

"I think the immediate cause of the death was *acute inflammation of the liver*. Acute inflammation is caused in tropical climates by using alcoholic stimulants. It is not a common disease in the temperate zone. It might be caused by a kick, blow, or other external violence without causing any external mark. The injury that would cause the state of the liver, we found, might have remained eight or nine weeks. My opinion is that inflammation of the liver as we found it, might be more apt to be caused by external violence than from other causes, effects of food or a hearty meal may cause inflammation."

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The deceased died the 10th day of November, 1881; was in apparent good health until about the 18th October, when she took to her bed and continued there until she died. There was no evidence of any act of violence committed by the prisoner towards his wife for some months before her death, except one. Sophia Fair swore that she was at the prisoner's house on Sunday evening, when the deceased had a black eye. Witness asked her the cause of it. The deceased said that after they had gone to bed the prisoner asked her to get up and get him a drink of water. He next wanted her to get up and get him a bottle of pop. She told him to get up himself, as she was tired. He got up and went to the bar and she followed him; returning he met her in the door and struck her with a pop bottle. She told me she fell over against the door and remembered nothing more until she came to in the morning, when she got up and crawled into bed. I asked the prisoner why he struck his wife? He replied that he remembered nothing about it. Then there was the evidence of Laura Moore, who swore that the prisoner told her in October that the cause of his wife's black eye was that he had struck her with a ginger beer bottle. There was also evidence that the prisoner treated the deceased badly; committed several brutal assaults upon her during a period between four and eighteen months before her death, but it is clear that none of these assaults could have caused the inflammation of her liver, from which she died, as none of these were within four months of her death.

Before discussing the question, whether there is any evidence in this that the prisoner killed his wife, it will be convenient to ascertain what the duty of a Judge is in a criminal case when there is no evidence that the prisoner committed the crime for which he is tried; and I think, beyond all question, that before any case can be submitted to the jury, the Judge is bound to decide, as a preliminary question of law, whether there is any reasonable evidence of the facts necessary to make out the case, and no Court has any right to submit any question of fact to a jury unless there is first *proper* proof of that fact given in the case.

Mr. Best, in his valuable work on the principles of the laws of evidence, lays down the true rule in section 82. He says:

"Moreover as decisions of tribunals on questions of fact ought to be based on reasonable evidence, and when the facts are undisputed the decision as to what is reasonable is matter of law, and consequently within the province of the Court. It follows, that it is the duty of the Court to determine whether, assuming all the facts proved by the party on whom the burden of proof lies to be true, there is any evidence on which the jury could properly, that is, without acting unreasonably, in the eye of the law decide in his favor, and if there be not, then the Judge ought to withdraw the question from the jury and direct a nonsuit if the onus is on the plaintiff, or direct a verdict for the plaintiff if the onus is on the defendant."

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See *Ryder v. Wombwell*,¹ *Toomey v. Lon. Bri. & South Coast Ry. Co.*² That this rule is applicable to criminal cases is shewn by *Regina v. Smith*,³ which was a conviction for manslaughter. Blackburn, J., in that case says:

"I cannot say that there is no evidence at all of such a state of things: there may have been a scintilla of such evidence, but in my opinion that is not sufficient, because I think in criminal cases a mere scintilla of evidence ought not to be left to the jury. It follows that the Judge on the trial of every cause, whether civil or criminal, has to say whether facts have been established by evidence from which the jury may reasonably infer everything necessary to sustain the case against the defendant before he is authorized to submit the case to the jury. In my opinion, it would be placing in the hands of a jury a power which might be exercised in a most arbitrary manner, if they were at liberty to find the case against the defendant from any state of facts whatever."

And in a case like the present, where the prisoner for years, either intentionally or by the effects of debauching himself with the use of intoxicating drinks, had been in the habit of brutally beating and misusing his wife in a most unjustifiable manner, I can readily understand how a jury, if left to themselves, would find him guilty of almost any offence that would cause him to be punished, although I cannot conceive why the prisoner was not indicted for these offences of which there was clear evidence instead of for killing his wife, of which there does not appear to me to have been any. This reduces the question to whether there was any evidence to shew that the prisoner killed his wife.

Before discussing this, it will be convenient to ascertain, if possible, what is meant by legal evidence of a fact. This is very difficult to define accurately, but generally it may be said

¹L. R. 4 Exch. 22.²Q. B. N. S. 146.³11 Jur. N. S. 686

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that there is such evidence of a thing when it is made plain or evident. The first thing the Judge has to do is to assume that all the facts proved by the party on whom the onus lies are true, and then he is to decide whether the truth of these facts make it reasonably plain and evident that all the facts necessary to support the case exist, so that a fair mind ought to act upon it, or does that still leave some of the necessary facts in such a state of uncertainty, that it is a mere matter of conjecture, whether they exist or not. In the first case, the Judge ought to leave the question to the jury who are the sole judges whether the evidence of the facts is trustworthy or not; and if the latter, he should nonsuit or direct a verdict against the party on whom the onus lies. Applied to this case, it would stand as follows: The fact to be proved against the prisoner before he could be convicted is that he killed his wife. The evidence shews that she died from acute inflammation of the liver, *ergo*, he could not have killed her unless he, in some way, caused that inflammation. The only thing he did that was suggested might have that effect was that he, the night before she took to her bed, struck her with a bottle on the head and knocked her down, she falling against a door. It blackened her eyes. It is not shewn what part of her person struck the door or what part struck the floor, and there is no evidence that such a thing would even likely cause the inflammation. It appears to me that it is impossible for any jury to say, even assuming all these facts to be absolutely true, that it is reasonably plain that the inflammation was the result of these acts of the prisoner, even conceding they might have caused it. Whether they did or not must be the merest conjecture and, therefore, in my opinion, the proof that the prisoner killed his wife failed, and his conviction should be quashed. I am also of the opinion that the statement of the wife of these facts, although in the presence of the prisoner, is not evidence of the existence of those facts. All the evidence there was against the prisoner of his assault on his wife in October is what he said to the witness, Laura Moore, that he struck her with a ginger beer bottle which blackened her eye. This is very different from the statement that he knocked her down and that she fell against the door. I am not prepared to hold that

the evidence of what the wife said in the presence of the prisoner was not admissible, but in my opinion, as I pointed out in *Robinson v. Tapley*,¹ the answer alone is evidence, not the declaration of the third party. Such declaration is only admitted to understand the answer and if the whole proves anything, it is because the prisoner's answer admits something, and it is clear the prisoner here admits nothing. See 1st Taylor's Evidence, section 749.

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It has been suggested that the jury might not have believed that the prisoner did not remember. And without considering what is proved on the trial of the state the prisoner had brought himself to by his drinking habits, though I myself think his statement quite likely to be true, yet I admit that the jury had a perfect right not to believe it; but this in my opinion would not make any evidence, for the question is not should the prisoner remember or not, but did he admit, either by his words or his conduct, the truth of what his wife said. And whether what he said was true or false, it cannot be tortured into an admission. Again, it has been suggested that as the jury might infer that the prisoner had committed other violence on his wife when she was unconscious, and it is true that this might be; but if a thing is proved because it might exist, then any thing can be proved, and there is an end of any thing like certainty, and the lives and property of persons in Her Majesty's Dominion are much less secure than I supposed, and as I believe the law secures them.

KING, J. I am of opinion that the conviction should be affirmed. The first question relates to the pleadings. In the first count the prisoner is charged with the murder of his wife Mary Janet Theal, and in the second count with manslaughter in killing "the said Mary Janet Theal." There was no necessity for the second count, and it is difficult to see why it was inserted at all, or why (if inserted) it was not laid in the customary way as if purporting to charge a separate act of crime. No question could then have arisen upon the indictment as a mere matter of pleading. The difficulty arises here from it being alleged in the second count that the charge of manslaughter relates to the same person whose killing is charged in the

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first count as murder. There was long a technical rule for the avoidance of duplicity which required that, where it was sought to charge the same cause of action in several counts of a declaration, the counts should be framed as if relating to different causes of action, otherwise they would be open to special demurrer for duplicity. This rule was considered in *West v. Troles*;¹ *Hart v. Longfield*;² *Holford v. Dunnnett*;³ *Bleaden v. Rapallo*;⁴ and *Deere v. Ivey*.⁵ In *Campbell v. Regina*,⁶ Lord Denman in delivering the judgment of the Court said:

"One cause of action cannot properly be charged twice over in the same declaration. Neither, as we think, can one offence whether felonious or not, be properly charged twice over, whether in one indictment or two; and as special demurrers are not necessary in criminal cases, we think that if the two counts in an indictment necessarily appear to be for the same charge, the objection might be taken in arrest of judgment."

He then went on to say in reference to the case before the Court:

"Now here it appears to us that they cannot be said to be necessarily for the same charge; for they may be pointed at a stealing in a dwelling house, and another stealing out of it: therefore we think the indictment is good."

But the Court of Exchequer Chamber while affirming the judgment (*Campbell v. Reg.*⁷) state that they do so "without expressing our concurrence in the opinion propounded by the Court of Queen's Bench, that the second counts must be for different offences, and that the indictment would be bad if it appeared they were for the same." The cases of *Reg. v. Craddock*;⁸ *Reg. v. Huntley*,⁹ and *Reg. v. Downing*,¹⁰ seem to me when rightly regarded to be in accordance with what is here suggested by the Court of Exchequer Chamber to be the law: and moreover, as it is proper and oftentimes necessary to charge the same act of felony in different ways in several counts in order to meet the facts of the case, and as the course of modern pleading, as stated by Patteson J., in *Deere v. Ivey*,¹¹ tends towards the placing of the truth upon the record, it seems reasonable to hold, that in charging the same act of felony in two different ways in two different counts, it is not necessary to re-

¹¹ Salk. 213.

²⁷ Mod. 148.

²⁷ M. & W. 848.

⁴³ M. & G. 116.

⁵⁴ Q. B. 379.

⁶¹¹ Q. B. 799.

⁷¹¹ Q. B. 838.

⁸²⁰ L. J. M. C. 31.

⁹⁶ Jurist N. S. 80.

¹⁰² C. & K. 282.

¹¹⁴ Q. B. 284.

sort to the expedient of falsely stating on the record that the two counts relate to two different acts of crime. But no objection was taken to the indictment on this ground, and no cases bearing on the subject of duplicity were cited before us. The points argued were that the two counts are repugnant and contradictory, and that the finding of the Grand Jury was uncertain. As to the repugnancy the second count does no more than charge expressly what is impliedly charged in the first count. In a count for murder the killing is the substance and the malice is but circumstance of aggravation. 2 Hawkins, P. C. cap. 47, s. 4. Hence the jury may acquit of the murder and find the prisoner guilty of manslaughter on an indictment for murder. As therefore the grand jury by an indictment for murder charge a *corpus delicti* that may be found by the petit jury to be either murder or manslaughter, it would not seem to be repugnancy, but mere surplusage, to charge in a second count what is already included in the charge in the first count. The fact that the judgment on one count would be capital, and on the other imprisonment, has been decided not to be material. Then it is said that the grand jury have come to no certain conclusion respecting the offence. But, considered simply as a finding, the finding is as a matter of fact as certain (within the meaning of the term as used in this objection) as would be a finding of a true bill where the one act of crime is laid as murder in one count, and in a second count as manslaughter of the same person, falsely designated as another person of the same name; or where murder by poisoning is found in one count, and murder by drowning the same person (under the like false designation) in a second count; or where larceny is found in one count, and receiving the same goods knowing them to have been stolen in another count. Then it is said that the second count is repugnant in itself, as in effect alleging that a person who had been murdered as described in the first count was also killed under circumstances amounting to manslaughter as in the second count. But the words "the said Mary Janet Theal" do not incorporate into the second count any of the statements of facts mentioned in the first count, least of all do they so incorporate the mode of killing and the intent of the prisoner in killing, but at the most they mean that the deceased is the same

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person whose killing was charged against the prisoner in the first count. The two counts are simply two ways of charging the killing, which according to Hawkins is the substance of the offence; the first count charging it as having been done with malice aforethought, and the second count charging it as having been done without malice aforethought; and as happens in all cases of indictments varying the charge in different counts, the *petit* jury may find according to the fact, and so may determine which of the charges is correct where both cannot be true. It seems to me therefore that the only possible objection is the technical one of duplicity, and that objection I have already considered.

The next question is, whether there was any evidence which the learned Chief Justice should have left to the jury. I think there was: but before considering this, I may say that I think this question is one that may properly be reserved for our consideration. In *Metropolitan Railway Co. v. Jackson*,¹ it is said that: "if the facts as to which evidence is given are such that from them a further inference of fact may be legitimately drawn, it is for the jury to say whether that inference is to be drawn. But it is for the judge to determine as a matter of law whether from those facts that farther inference may legitimately be drawn." I think therefore that this question relates to a matter of law that arose on the trial. Coming then to the question itself it seems to me that there were facts proved from which the jury might legitimately draw the inference that the prisoner's act contributed to the death of the deceased, and that therefore he might properly be found guilty of manslaughter.

The deceased died on the 10th November, after an illness of about three weeks. Dr. White, who with Dr. Macfarlane made a *post mortem* examination, says:

"I performed a *post mortem* examination with the assistance of Dr. Macfarlane. We examined the body. Did not find any local bruises, except on the left arm a small discoloration and two small discolorations on the abdomen near the umbilicus about the size of a twenty-five cent piece. A kick might cause these marks, a boot might. The discoloration on the arm was from one to one and a half inch in length; a slight blow might cause the discoloration. There was a great deal of fulness on the side extending from the right side over to the left. The discoloration on the eye was distinct. * * * I

¹L. R. 3 App. Ca. 198.

opened the cavity of the abdomen. I was attracted by the unusually large condition of the liver which came up into the opening. The liver was about twice its natural size. I removed the liver. * * We found it much darker in color than natural, very soft and breaking down with the slightest pressure of the finger, particularly the right lobe, indicating that it was very much disorganized and had evidently undergone a high degree of inflammation. As it broke down a peculiar fluid issued from it, which, though not pus, we concluded contained pus matter. * * We did not cut the liver. It was in shreds: we tore it with our fingers. We did not find any abscesses in it. * * We removed the spleen and found it enlarged and congested. * * Our opinion was that the disease of the liver was the immediate cause of the death. We believed the disease of the liver to be acute, *i. e.* in the proper acceptation of that term. We did not notice any indication of chronic disease in any vital organs. We thought the disease was of three or four weeks duration."

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Dr. Macfarlane gives a like description of the body. He says that the liver was found to have undergone a process of disintegration, shewing that serious structural changes had taken place, exhibiting that the liver was in an advanced stage of inflammation; that the two spots on the left side, a little below the region of the spleen near the umbilical, were of the same color (a dark claret) as the spot round the left eye that extended half way up the forehead and half way down the cheek; and that a blow, thrust or fall would cause the marks on the abdomen. As to the immediate cause of death he agrees with Dr. White, and says:

"I think the immediate cause of death was inflammation of the liver. It was acute inflammation. It had probably lasted two or three weeks."

As to the cause of such disease, Dr. White says:

"A blow, or a fall on a hard substance, might cause the acute inflammation of the liver. In my experience, cases of acute inflammation of the liver are not common in this climate. The disease would cause the appearance of the liver I found. I had seen deceased frequently before the 17th October, and she always appeared to me to enjoy tolerably good health. Her body was well nourished. I think I only visited her three times since 1871."

On cross-examination, he says:

"I cannot tell positively what caused the inflammation of the liver. Change of temperature might cause it, by a person being overheated and then exposed to a lower degree of temperature. Extreme heat might cause it. In my experience abuse of alcoholic liquor will not cause inflammation of the liver, but will cause disease of the liver,

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but not inflammation. I have never known purgatives to cause it; perhaps they might if they were mercurial purgatives."

On re-examination, he says:

"High temperature will cause inflammation of the liver. It is more common in the tropics than here. [And to a juror.] I found no mark on the right side over the region of the liver at the *post mortem*. I did not examine it before [*i. e.* during his attendance before death.] The two spots on the abdomen were not in the region of the liver. A blow may be received in the abdomen which would cause death without producing any local manifestation. I believe a blow could be given which would cause inflammation of the liver without producing any external mark. I have known a person killed by a blow in the abdomen without shewing any external injury."

As to the origin and cause of the disease, Dr. Macfarlane says:

"It had probably lasted two or three weeks. Acute inflammation is caused in tropical countries by using alcoholic stimulants. It is not a common disease in the temperate zone. I think it might be caused by a kick, or a blow, or external violence, without leaving any external mark."

On cross-examination, he says:

"It would not be remarkable in this case that there was no external mark of violence. The injury which would cause the state of the liver we found, might have remained eight or nine weeks."

And on re-examination, he says:

"In ordinary cases, pus begins to form in two or three weeks after the inflammation commences. The patient would feel pain very soon after acute inflammation had commenced. Acute inflammation would be likely to run its course in from eight to ten days. [And to a juror.] My opinion is, that inflammation of the liver, as we found it, would be more apt to be caused by external violence than from other causes; effects of food—a hearty meal—may cause inflammation. Pus begins to form in two or three weeks after acute inflammation."

These things then are proved, or at least there is some evidence going to prove them, viz., that deceased died from acute inflammation of the liver; that she had no chronic disease of the vital organs; that the disease that caused her death was of from two to four weeks duration; that the inflammation would be felt soon after the disease had begun; and that the state of inflammation in which the liver was found at death would be more apt to be caused by violence than by any other cause. The presumable cause of death is therefore to be looked for in some violence suffered by the deceased from two to four weeks before her death, and a short time before the active symptoms were developed.

Now, what do we find? The deceased died on the 10th November. Two weeks before that, viz., on Wednesday the 26th October, she was visited by Dr. White, who found her then suffering from the disease that resulted in death. She had then marks of a blow on her face which continued up to death. Dr. White says, that when he first saw her,

"She was lying on her back. She had a large discoloration over the left eye, and round the eye, and extending down on the cheek. * * She complained of severe pain in the right side, and tenderness on pressure. It was directly in the region of the liver. She complained of great soreness in that region and difficulty in turning in bed. * * I did not see her again until 7th November. Wm. Lord, a brother of deceased, came for me. He got a horse for me and I drove out alone. Mrs. Theal had been moved to the other room. All her symptoms were aggravated considerably. The discoloration over the eye had improved some. The pain in the side was greater than before, more fullness, and extended more over the liver. Her pulse was more rapid and her temperature higher than on the 26th October. She said she did not feel so well as before. She complained of pain in the region of the liver, extending from the region of the right to the left lobe. I considered her condition critical. I sent medicine for her by the brother. I got a message on the 10th November and started to go out with the Rev. Mr. Burgess. On the way out I got word that she was dead."

Mrs. Fair, a neighbor, gives an account of the deceased from Friday, October 21st, until Dr. White was called in on the 26th October. She says:

"I was at Theal's house last October. I don't know what time in the month. I saw the prisoner and his wife. She was in her sitting room. She had a handkerchief tied round her eye, her left eye, I think. There was a black mark around her right eye. She was sitting up. She had been doing her work. I asked her what ailed her. She said she stepped on it. She laughed. *This was Friday. I saw her again on the following Sunday.* She sent for me. She was in bed. She said she had a pain in her side. Prisoner was there. He seemed to be doing all he could for her. She had no bandage on her face. Her left eye was black and bloodshot. She complained of pain in her back and right side. * * *I was there again in the evening.* She sent for me. She was heaving;* complained of pain in her side and across her back. She could not touch any thing but cold water. She would drink quarts of water. I remained all night there. * * I don't remember whether I stayed with her the next night. I stayed with her two nights altogether. I think it was the next night (Monday). She was heaving; complained of pain in her side, and said she was sore all over. I visited her several times.

* Vomiting.

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She was heaving all the time. She was confined to her bed from that Sunday out, only as we sat her up to make her bed. I was there the morning before she died. She was dying then; her face was black, not much swelled; her face was black and green round both eyes, a kind of dinge in her forehead. Before that her general health was good during the time I knew her (nine years). She always attended to her domestic duties."

Here, then, we have a time, viz., between Friday the 21st October and Sunday the 23rd October, when the active symptoms of the disease were developed; and we are to look for cause in something happening shortly before this.

The testimony of Cornelius Hagarty, who worked at Theal's for five days, about three weeks before Mrs. Theal died, and therefore in the same week in which Mrs. Fair speaks of having seen her on the Friday shows that Mrs. Theal was in good health in the early part of the week and up to the time when she received certain injuries. Hagarty says:

"I was there (at Theal's) about three weeks before she died. I dug the potatoes for them. I was there five days. She and the little girl picked them up. She had a clean good face on her when I went to bed. When I got up in the morning her face was badly damaged, badly bruised; her left eye closed. The left eye was the worst. The day before that, she picked the potatoes and wheeled them in. She was a strong woman. * * *She went to bed early in the day when she had the black eye. She did not get up that day.* She was up the next day. I went away that day about 12 o'clock. Her face looked bad enough that day. I saw her after she died; her eyes were black then."

Now as to the cause of this: Mrs. Fair says that when she was with deceased on the Sunday night spoken of, she had a conversation with her about it in the prisoner's presence. She says:—

"I asked her the cause of her black eye. She said they were in bed, and he wanted her to get up and get him a drink of water. I am not sure whether she said that she got it or not. She also said he wanted her to get up and get him a bottle of pop; that she told him to get up and get it himself, that she was tired." [She had been wheeling potatoes.] "That he jumped up out of bed himself and went and got it. She got up and followed him. He met her in the door and hit her with the pop bottle. She said she fell over against the door, and did not know any more about it till she came to; did not know how long she laid there; that she got up and crawled in the bed in the morning. I asked Theal why he did it and he said he did not recollect doing it at all."

Another witness, Laura Moore, stated that she had a conversation with prisoner after this, in which he said that his wife had two black eyes that would keep her in the house for some time, and that he had done this by striking her with a ginger beer bottle. From this, and from Theal's answer to Mrs. Fair, in which he does not deny what his wife had said, and from his refusal at first to allow Dr. White to see his wife, there appears to me to be sufficient evidence for the jury to come to the conclusion that the admitted injury to the head, etc., was caused in the way in which Mrs. Theal had stated.

We have then a disease which may have been caused in several ways, but which is more likely to have been caused in one way, that is to say by violence, than in any other way, and of which the presumable cause therefore was violence. Then there is an entire absence of proof of any other of the suggested causes of such a disease. Mercurial medicines were suggested, but nothing of the kind was proved. Alcoholic liquor was also mentioned as a possible cause, but the attempt to prove that the deceased used such liquors entirely failed. Exposure was also mentioned, but the only exposure proved, was that which resulted from the prisoner's assault, when she lay on the floor all night unconscious, and which exposure may well have contributed to her death. As to the extent of the violence inflicted by the prisoner, it was sufficient to make her take to her bed the next day. Haggarty says that he saw her in the morning, and that "she went to bed early in the day, and did not get up that day." Then there is evidence that, at the time she received the black eye, she also received other blows on the body. Her statement of the occurrence does not exclude other blows than that spoken of by her, as she became unconscious after receiving the first blow. The proof of other blows is found in the other marks of violence on her body; the mark on the arm, and the two marks on the abdomen. These are not otherwise accounted for, and presumably they were caused at the same time as the marks about the face, as they corresponded in color and appearance after death with the marks on the face. Now although blows were given on the head and arm, and on the abdomen near the region of the liver, no blow upon the liver is shown. But I do not think

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that this is necessary. It seems to me that when a person is shown to have beaten another in a certain manner, as by blows or kicks, and when the beating is shown to have been followed immediately (or at such interval as would separate such an injury from its cause) by injuries, which might be caused by other like blows or kicks, and which are more likely to have been caused by violence than by anything else; and when no other cause is suggested by any reasonable view of the evidence, then it is reasonable to refer the injuries to the beating as their cause, even although there is no proof that a particular blow was given that may be deemed necessary to the result, provided always however that the evidence is not inconsistent with the beating being the cause of the injury. It would be otherwise if the evidence were inconsistent with such inference; as for instance, if the extent and nature of the beating were clearly proved, and if the beating as proved was insufficient to cause the injuries. Here there is no proof to limit the extent of the beating, and it is proved that violence sufficient to cause acute inflammation of the liver might be inflicted without leaving any external mark. For these reasons I think that there was evidence on which the jury might find the prisoner guilty of manslaughter.

As to the evidence given of other beatings of his wife by the prisoner within a year of her death, the only question now relates to its admissibility, and although I cannot see what weight it could possibly have as tending to prove that such beatings contributed to the death, still I cannot say that the prosecution might not seek to prove it. The evidence might also, as contended, be relevant to the proof of malice, by shewing the general conduct and disposition of the prisoner towards the deceased.

WETMORE, J. The case reserved for the consideration of the Court presents the following points:

1st. Whether the indictment should have been quashed by reason of its containing a count for murder, and also one for manslaughter.

2nd. Whether the evidence of assaults and violence committed by the prisoner upon the deceased prior to the 10th November, 1881, was properly received.

3rd. Whether there was any evidence for the jury to sustain the first count of the indictment; and on this point it was understood—all the evidence might be referred to.

As to the first point: In Roscoe's Crim. Evidence (9th ed.) 84, it is said—

"The rule of divisibility of averments may be stated thus: that if in the indictment an offence is stated which includes within it an offence of minor extent and gravity of the same class then the prisoner may be convicted on that indictment of the minor offence, though the evidence fail as to the major. Thus, upon an indictment for *petit treason*, if the killing with malice was proved, but not with such circumstances as to render the offence *petit treason*, the prisoner might still have been found guilty of wilful murder upon that indictment. *R. v. Swan, Foster*, 104. So, upon an indictment for murder, the prisoner may be convicted of manslaughter. Citing *Gilb. Ev.* 262. *Macalley case*, 9 Rep. 67 (b); *Co. Litt.* 282 (a). And where a man was indicted on the stat. 1 Jac. 1, for stabbing *contra formam statuti*, it was held that the jury might acquit him upon the statute and find him guilty of manslaughter at common law. *R. v. Harwood, Style*, 86.¹ Where a man is indicted for burglary and larceny, the jury may find him guilty of the simple felony and acquit him of the burglary."

In Roscoe, 899, it is laid down that a person may be legally charged in different counts of the same indictment both as the principal felon and as the receiver of the same goods. *R. v. Galloway*.² But the Judges on a case reserved were equally divided in opinion whether the prosecutor should in such case be put to his election. They all agreed however that directions should be given to the respective clerks of assize not to put both charges in the same indictment. By 24 & 25 Vic. c. 96, s. 92, these counts may be joined.

In point of law, there is no objection to inserting in separate counts of the same indictment several distinct felonies of the same degree, and committed by the same offender. Roscoe, 205. In practice, where a prisoner was charged with several felonies in one indictment, and the party had pleaded, or the jury were charged, the Court in its discretion would quash the indictment, or if not found out until after the jury were charged would compel the prosecutor to elect on which charge he would proceed. Roscoe 206: citing *R. v. Young*.³

In the present case the counsel for the prosecution did elect to proceed on the murder count only—and, I should think, by

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¹2 Hale P. C. 302.²1 Moo. C. C. 234.³23 T. R. 106; 2 East P. C. 515; 2 Camp. 133; 3 Camp. 133; 2 M. & S. 539.

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so doing remedied any error that *may* have existed from the addition of the count for manslaughter; but I think legally there was no objection to the indictment containing the two counts: on the murder count, if the evidence was insufficient to establish the aggravated offence, the jury could have found for the lesser, manslaughter, simply because the aggravated charge included the lesser one. The charge for murder included a charge for manslaughter, and would do so in all indictments for murder: in fact it must do so. I fail to discover any legal objection to putting the charge in words for manslaughter in a separate count, when the very same charge is actually included in the charge for murder. It is unnecessary to decide whether on a bill of indictment for murder the grand jury could properly ignore the charge for murder, and put the party on trial for manslaughter by finding a true bill for manslaughter. I do not readily see any objection to such a finding. But where the same killing is put in one count as murder, and in another count as manslaughter, I cannot see the least reason for objection. The indictment charges the killing in the two ways. The Judge in his charge tells the Grand Jury exactly what evidence is necessary to establish the murder charge, and what is necessary to constitute manslaughter; that if the jury are satisfied there is sufficient evidence of murder to put the prisoner on trial for murder, then the indictment should be found upon both counts, and if the evidence failed to sufficiently establish the charge for the aggravated offence but was sufficient to make out the minor charge, then to find a true bill on the manslaughter count only.

There is no uncertainty about this course: the Grand Jury, under a proper charge from the Judge, simply pronounce in their opinion which offence is proved, and on the trial with only a murder count, the Judge defining the offences tells the jury if they are satisfied the evidence establishes the charge of murder, to find the prisoner guilty of murder; if not satisfied the charge of murder is made out, but the evidence does establish the crime of manslaughter, to find accordingly, and this without a count for manslaughter; simply because the charge of murder includes manslaughter. The manslaughter charge is contained in the murder count: and what possible

objection can there be to setting the charge of manslaughter forth in a count by itself. I fail to discover any satisfactory objection. The additional count would seem rather an unusual and it may be unnecessary style of procedure, but I see no legal objection to it.

As to the second point: it seems to me any threats or acts of violence used by the prisoner towards the deceased, leading up to establishing the charge made, could not have been properly rejected. The series of assaults and ill treatment proved in the present case all tended to establish the offence charged; all led up to shew the mind, the feeling and the motives of the prisoner towards the deceased. Roscoe 94 and 96; citing *R. v. Tattershall*¹, cited by Lord Ellenborough. I don't think it mattered whether any of these assaults were committed within, or beyond a year from the time of the death of the person alleged to have been murdered.

The third point, as to whether there was any evidence for the jury: on reference to the learned Chief Justice's minutes, the surgical evidence shews there were several bruises on the person of the deceased, but they ascribe the immediate cause of death to acute inflammation of the liver, which they said was caused in tropical climates by the use of alcoholic stimulants; but was not a common disease in this country. *It might be caused by a kick, a blow, or external violence, without leaving any external marks.* There is the evidence of the continued severe beatings, and one witness states, that on two occasions when the prisoner was beating the deceased he swore he would take her life if he was hanged for it. Then there is the evidence of Mrs. Fair, who a short time before deceased's death, found her ill in bed, her left eye black and bloodshot, and complaining of pain in her back and right side: that she asked deceased in presence of prisoner what caused her black eye, to which she answered that the prisoner wanted her to get out of bed and get him a bottle of beer, that she (deceased), said she was tired, and told him to get it himself; that he got out of bed and went for the beer; that she got up and followed him; that he met her in the door and hit her with the bottle, that she fell against the door, and did not know any more about it till she came to;

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¹ 2 Leach, 964.

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that she did not know how long she lay there; that she got up and crawled into bed in the morning. The witness then asked the prisoner the cause of his doing this; to which he answered, *that he did not recollect doing it.*

Taylor's Evidence, section 740 says:—

"But *the silence* of the party when declarations are addressed to himself at a time too when he is at full liberty to reply as he thinks fit is at best worth very little as evidence of acquiescence. And if he has no means of knowing the truth or falsehood of the statement, the fact that he did not in terms deny it, is almost valueless. In all cases, it must be distinctly remembered that the statement made in the party's presence or hearing is not evidence against him, *but his own conduct in consequence of such statement is the sole evidence.*"

The prisoner said he did not recollect of maltreating the prisoner. Is it possible that the prisoner, the husband of the deceased, could have beaten his wife as brutally as her statement to Mrs. Fair indicates, and not recollect whether he did so or not? Had he got into such a chronic habit of cruelly beating her, that on this particular occasion he had no memory whether he had done so or not? He does not deny doing it however. You must look to the other evidence, and the surrounding circumstances to ascertain what credence is to be given to the prisoner's conduct in consequence of the statement. To ascertain what are the facts established by his conduct, you take the statement, the prisoner's conduct, the other evidence, the surrounding circumstances as detailed in evidence, to decipher the reasonable meaning of his conduct and what he says. He answers he did not recollect doing it,—he does not deny doing it. Then take the evidence of Laura Moore. On the 25th of October, 1881, she saw the deceased in bed in her own house: she complained of pain in her left side; her left eye was covered with a handkerchief; a large blister under her left eye, as large as a 60 cent piece; a dark mark under her right eye. She seemed to be suffering very much. Before this her general health seemed very good. (Bearing in mind this condition was the result of the maltreatment the prisoner had stated to Mrs. Fair, *he did not recollect doing.*) On the 29th of October, this witness saw the prisoner at her house and asked him how deceased was, he said she was nicely. The witness told him to let her come up, that witness wanted to see her. He

said she was so busy minding the hens and geese that she could not come; he also said witness had better go down, that she (deceased) could not come up, that she had two black eyes that would keep her in the house for four weeks. Witness asked him what caused the black eyes; prisoner said he struck her with a ginger beer bottle; witness said it was too bad; prisoner shook his head, laughed and went out. Applying this evidence to his conduct in consequence of the statement made by the deceased, and to which Mrs. Fair interrogated him, and *his saying he did not recollect doing it*; did he or did he not recollect doing it? It is true when Mrs. Fair interrogated him he *said* he did not recollect doing it. He however did recollect it sufficiently to tell Laura Moore that the deceased had a pair of black eyes that would keep her in the house for four weeks, caused by his striking her with a ginger beer bottle. The jury, no doubt, considered the prisoner's statement to Laura Moore as the truth, and did not believe his statement to Mrs. Fair that he did not recollect doing it, and I think very reasonably so. She says she fell against the door, which must have given her a sharp blow; and it was for the jury to say if this blow caused the acute inflammation of her liver, which resulted in her death. Very slight evidence requires the case to be submitted to the jury. See *Regina v. Hooper*.¹

It seems to me there was not only some evidence, but very strong evidence for the jury to pronounce upon, and I do not see any reason to find fault with the verdict. The conviction I think should be sustained.

WELDON, J. I am of opinion there is nothing in the first objection. It was not necessary to have added the count for manslaughter, for in case the evidence adduced to prove the charge of murder alleged in the first count was insufficient, it might prove the offence to be manslaughter. To make out a case of murder, it would not only be necessary to prove the prisoner caused the death, but that the act which caused it was done with an intent to take the life of the deceased, that is, with malice. If the evidence failed to make this out, but was sufficient to establish the fact that the prisoner caused the death without malice, the jury could find him guilty of the lesser

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¹ 1 F. & F. 85.

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offence, which would be manslaughter, which is charged in the second count, without its being so laid in the indictment. The prisoner suffers no disadvantage: the same mode of trial, and the same challenges to the jury are allowed, and the same evidence is to be determined upon by the jury, whether the prisoner did the act with or without intent or malice.

In the case of *Regina v. Downing and Powys*,¹ the prisoners were indicted for murder. The indictment contained two counts. The first count charged Paul Downing and Charles Powys with making an assault upon the deceased with malice aforethought, that Paul Downing with a gun shot the deceased, and Chas. Powys was consenting thereto, and aiding and abetting in the killing of the deceased. The second count charged that both the prisoners "afterwards" to-wit, on the same day and year aforesaid, etc., and the said Charles Powys with a gun shot the deceased, and Paul Downing was consenting thereto and aiding and abetting the said Charles Powys in the killing of the deceased. The case was tried before Mr. Justice Coltman: the prisoners were found guilty, and sentence of death passed upon them. The learned Judge reserved for the opinion of the fifteen Judges the question whether there was any legal objection to the sentence being carried out. Huddleston, counsel for the prisoners, submitted the following points to the Court: 1st. The jury should have been directed to find the prisoners guilty on one or other of the counts only; and 2nd. That the verdict, as found, was not sufficient to support either count. The doubt arose, it was contended, by the word "afterwards," introduced in the second count.

The case was fully argued before the fifteen Judges, who considered the conviction right, and the prisoners were afterwards both executed.

In the present case the prisoner Theal is convicted of the minor offence charged in the indictment, and acquitted of the greater offence. The evidence did not, in the opinion of the jury, warrant them in finding him guilty of the intent.

In Russel on Crimes, 1 vol. 564, it is stated that where the coroner's jury have found a verdict of manslaughter, and the grand jury a bill for murder, the prisoner has been arraigned

and tried on both the inquisition and indictment at the same time (citing for this *Reg. v. Watters*, Hereford Summer Assizes, 1841, Colman, Justice, Ins. Cases): So where the grand jury have found a bill for manslaughter, and the coroner's jury a verdict for wilful murder, (citing 8 C. & P. 160).

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From these authorities, I think the principle is clearly deducible that where an indictment contains a count for murder and a count for manslaughter against a prisoner, and where the same evidence is given of the deceased having come to his or her death by the same prisoner, no objection can be raised to the same. The prisoner is not in the slightest degree prejudiced by it, and the Chief Justice was fully warranted in refusing to quash the indictment. As to the second point reserved, I think the evidence was clearly admissible to shew the animus of the prisoner towards the deceased, and to sustain the charge in the first count of the indictment. And as to the third ground, that the evidence was insufficient to support the finding of the jury: there does not appear to me, to be any authority for the Judge to reserve a question of this nature for the Court. It would, in effect, be granting a new trial, which we have no authority to do. The Act of Assembly, Revised Stat., Cap. 159, Title XL. Of Trial, provides—

“When any person shall have been convicted of any offence before any Assizes, the Judge presiding at such Court, may reserve any question of *law*, which may have arisen during the trial, for the consideration of the Supreme Court, and shall have authority to respite the execution of the judgment until the said Supreme Court shall decide such question.”

I think this statute does not authorize the Court to consider the evidence, but only questions of law arising in the course of the trial. The Chief Justice thought the evidence admissible, and no grounds were urged by the counsel for the prisoner, but that it was too weak to sustain the finding of the jury. The jury were the only party to consider the evidence. The learned Chief Justice left the case fairly to them. If the evidence was weak, the jury had to consider the matter; it is not for the consideration of this Court. I forbear referring to the evidence in the Judge's notes, being of opinion we are not authorized to go outside of what is contained in the matter referred to in the reserved case—was this evidence admissible? If the evidence

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was weak, there is the clemency of the crown to be appealed to.

I am, therefore, of opinion this conviction must stand affirmed.

ALLEN, C. J. On the first point, I think the indictment ought not to be quashed.

Both counts charge the prisoner with homicide; and there is no greater repugnancy than in an indictment for assault, charging in one count, an intent to murder, and in another count, an intent to maim and disable, as in *Regina v. Strange*,¹ though the judgment was different on the several counts: being capital in one, and not in the other. In that case, the prosecutor was not required to elect on which count he would proceed. Nor is there any greater repugnancy here, than in an indictment charging the prisoner in one count with stealing goods, and in another, with receiving the same goods, knowing them to have been stolen: as in *Reg. v. Craddock*;² and *Reg. v. Huntley*.³ In each of those cases, it might be said, that it was uncertain which offence the grand jury intended to find the bill for. The objection in this case was entirely technical, and could be met by a technical answer. No possible injustice was done the prisoner, as the counsel for the prosecution having elected to proceed on one count only, the trial was in fact upon an indictment containing only one count. I thought the case of *Rex v. Young*⁴ was an authority for the practice adopted at the trial.

As to the other points: I think the evidence of the assaults prior to October was admissible, at all events, to shew the *animus* of the prisoner. I also think there was evidence to leave to the jury, and that I had no right to withdraw the case from them. I do not deny that a mere *scintilla* of evidence was not enough; but I think there was considerably more than that in this case. The medical evidence shewed that the cause of death was inflammation of the liver, and that it might be produced by a kick or a blow, without any external marks of violence. The statement of the deceased made to Mrs. Fair in the presence of the prisoner, of the cause of her black eyes, that he had struck her with a beer bottle and knocked her down, and that she fell against the door and remained on the floor insensible for a considerable time, was not denied by him; and though he did not admit it, but said he did not remember any-

¹ 8 C. & P. 172.² 14 Jur. 1081.³ 6 Jur. N. S. 80.⁴ 3 T. R. 108.

thing about it, the jury had a right to disbelieve him if they pleased; and they had also the right to consider his statement to Mrs. Laura Moore, made on the 25th October, just about the time Mrs. Theal was confined to her bed, and when she made the statement to Mrs. Fair, and to say whether the assault which he admitted to Mrs. Moore, was not the same assault which brought on the illness of the deceased. Her symptoms, and the pain she complained of to Dr. White, were consistent with the fact that the disease which caused her death was produced by the prisoner's violence, and by his knocking her down and kicking her in the side on several occasions. In *Reg. v. Heeson*,¹ on an indictment for the murder of a child by poisoning, evidence was received of the death of another child of the prisoner upwards of a year before, under symptoms similar to those of which the child died for whose murder the prisoner was indicted: the object being to shew that the death of the child was not accidental; and it was for the jury to draw that inference. Without referring more particularly to the evidence, which has been already so fully stated, I think there was evidence in this case from which the jury were justified in inferring that Mrs. Theal's death was not produced by natural causes, but by the violence and ill-treatment of the prisoner; though perhaps the evidence was somewhat slight.

DUFF, J. I concur in the conclusion of the majority of the Court.

Judgment affirmed.

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¹ 14 Cox. 40.

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THE WHEELER & WILSON MANUFACTURING COMPANY,

APPELLANTS,

AND CHARTERS, RESPONDENT.

Written Contract—Fraudulent misrepresentations—Tender—Consol. Statutes, c. 75—Bill of sale under.

A. being in treaty with the plaintiffs for the purchase of a sewing machine, signed an agreement stating that he had received the machine of the value of \$65, which the plaintiffs had leased to him for nine months at the rent of \$6 per month, \$15 being paid in advance at that time; that he would take care of the machine, and not part with the possession of it; and in case he made default in paying the rent or in the performance of the agreement, that the plaintiffs might take possession of the machine, and he would forfeit any rent paid: and the plaintiffs agreed if A. paid the rent, they would sell the machine to him for one cent at the expiration of the nine months. A. having made default in paying the monthly rent, the plaintiffs demanded the machine, which was in possession of the defendant under a bill of sale from A.: defendant refused to give it up, but afterwards, and before action brought, tendered the plaintiffs \$14, the balance of the \$65 unpaid. In trover for the machine, A. swore that there was a verbal sale of the machine to him for \$65, of which he paid \$15 at the time; that he did not read the agreement and the plaintiffs' agent told him at the time he signed it that it was an agreement to secure the balance of the purchase money by monthly instalments. The jury having found a verdict for the defendant on a question left to them whether the plaintiffs' agent had fraudulently represented to A. the contents of the written agreement;—

Held, per WELDON, WETMORE, PALMER, and KING, JJ., (ALLEN, C. J., *dubitante*), that if there was fraudulent misrepresentation respecting the writing, the property in the machine passed to A. under the verbal agreement, and he had a right to transfer it to the defendant.

Per WELDON, PALMER, and KING, JJ., that even if the property did not vest in A. till the whole price was paid, the tender of the \$14 before action would prevent the plaintiff from recovering.

Per ALLEN, C. J., that the evidence of misrepresentation of the contents of the writing was unsatisfactory.

Per ALLEN, C. J. and WETMORE, J., that if the property in the machine did not vest in A. till the whole price was paid there was a wrongful conversion by the defendant, which would not be affected by the subsequent tender of the balance of the purchase money.

An agreement for a conditional sale of a chattel, with the lease of it in the meantime at a monthly rent, is not a bill of sale under Consol. Stat., c. 75.

Appeal from the County Court of Westmorland. The action in the Court below was trover for a sewing machine. The defendant pleaded not guilty and gave notices of defence of no property in the plaintiff, and property in the defendant. The verdict was for the defendant.

The material facts are stated in the judgments.

October 24th, 1881. *George F. Gregory* supported the appeal. The contract between the parties having been reduced to writing and McDonald having had an opportunity of reading and making himself acquainted with its contents, the evidence of a verbal agreement anterior to the written agreement was improperly received; the effect of it was to control the written

instrument. Chit. Cont. 69; *Lewis v. Jones*.¹ There was an entire failure to establish any misrepresentation amounting to fraud. The representations of the agent of the company were immaterial, because they were merely as to the legal effect of the agreement; there was no misstatement of the contents, and no attempt was made to prevent McDonald from reading it and forming his own conclusion as to its effects before signing it.

The Bills of Sale Act (Consol. Stat. c. 75), does not affect this instrument, because it was not intended that the property should pass under it. It was not a bill of sale; it was a lease with an agreement to sell at a future time on the performance of certain conditions.

Wells, contra. There was evidence of fraud which the Judge was bound to leave to the jury, and they having found for the defendant, the Court will not disturb their finding. Rosc. Ev. 22, (ed. 1879); *Little v. Johnson*;² Benj. on Sales, section 428. McDonald had a right to rely on the statements of the agent that the agreement was only to secure the future instalments. *Patmore v. Colburn*;³ *Powell v. Edmunds*;⁴ 1 Stark. Ev. 672, (4 ed.); *Doe v. Allen*;⁵ *Robinson v. Vernon*.⁶ There can be no objection to the manner in which the question of fraud was left to the jury. If McDonald's signature to the agreement was obtained by misrepresentations as to its contents it would be void, and it would be competent for the defendant to set up the anterior parol sale by which the property passed to McDonald; and the defendant having tendered the balance due before action brought, the plaintiff would at most be entitled to nominal damages.

The instrument should have been filed under the Bills of Sale Act. It was an assurance of property, and it contained a license to take possession. Its object was to secure the plaintiffs' debt, and it is a bill of sale within the meaning of the Act.

Gregory, in reply. If the defendant intended to rely on the fact that McDonald's signature to the agreement was obtained by misrepresentation or fraud, he should have pleaded or given notice of this defence. The cases cited do not apply where the party has had an opportunity of examining the writing and

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¹ 4 B. & C. 506.
² 1 Kerr 496.

³ 1 C., M. & R. 65.
⁴ 12 East. 6.

⁵ 8 T. R. 147.
⁶ 7 C. B. N. S. 231.

1882. forming his own opinion as to its meaning. *Doe v. Allen* was not a case of contract at all.

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CHARTERS. I fail to see how the tender could affect the case. If there was a conversion at all, it was complete before the tender was made and the plaintiffs' right of action had accrued. A subsequent tender would not affect the damages. If the plaintiffs got a verdict the property after judgment would pass to the defendant, and appellants would be entitled to substantial damages. The respondent having elected to impeach the contract with McDonald on the ground of fraud, cannot set up any other contract against the company; therefore the property never passed out of the company, and the refusal to deliver was a conversion. The verbal agreement as proved is substantially the same as the written contract.

Cur. adv. vult.

The following judgments were now delivered:—

PALMER, J. This is an appeal from the County Court of Westmorland. The action was trover for a sewing machine. The evidence shewed that the plaintiffs' agent, Getchell, sold or leased to one McDonald the machine which McDonald sold to the defendant, and it appears to me that the property in the machine passed to McDonald at the time of the delivery thereof, or when the defendant tendered the admitted balance due thereon, \$14, before action brought. This I think must depend upon what took place between Getchell and McDonald at that time, and inasmuch as the defendant has the verdict, I think I am bound to assume that the defendant's witness' account of the transaction is the true one. McDonald, the witness says as follows:

"Getchell brought the machine to my shop. I asked him the price of it, he said \$65. I asked how much he wanted down; he said \$15, and delivered the machine to me. He said he came to sell me the machine; he said the machine was mine if I paid \$15. He prepared the paper produced, and said it was an agreement to pay the balance at \$6 a month. Neither he nor I read it. I signed it. He did not mention the word lease or renting in anyway."

The paper McDonald signed was as follows:

"I hereby acknowledge to have received this twentieth day of September, A. D. 1877, from the Wheeler & Wilson Manufacturing Company one No. 7 Wheeler & Wilson Sewing Machine (so called), No. 19,554, in good order and condition and to my entire satisfaction, and

of the value of sixty-five dollars, which said machine the said Wheeler & Wilson Manufacturing Company have this day leased to me for the term of nine months from this date, at the monthly rent or sum of six dollars payable in advance on the twentieth day of every month during the said term, the first payment of fifteen dollars being paid at the date hereof.

I do hereby promise and agree to and with the said company to rent the said machine for the time above-mentioned, and to pay the said rent at the day and times hereinbefore mentioned for the payment of the same. And further to pay the said company for any injury and damage done to the said machine during the said term, or so long as it may remain in my possession, reasonable wear and use excepted. And further to pay the said company the value thereof in case of its loss or destruction by fire or otherwise. And further, not to dispose of the said machine nor lend nor let it out of my possession, nor alter nor repair the said machine without the written consent of the said company for that purpose first had and obtained. And further, that I will at all times during the said term, inform the said company or their agent at Saint John of the whereabouts of the said machine; and in case of my removal to any other place of residence, that I will, previous to such removal, inform the said company or their agent of such my intention, and that I will not move the said machine without the written consent of the said company. And I do hereby give to the said company or their agent, full power and authority to enter in and upon the premises where the said machine is, for the purpose of viewing the same, or removing it should occasion require.

I do hereby further agree, that in case I should make default in payment of the said rent, or any part thereof, at any of the days or times herein mentioned for payment of the same, or in case I should violate any of the promises and agreements herein by me to be kept and performed, that then and in that case, the said company by their agent shall have full power and authority to enter the premises at any time where the said machine is placed, and remove the said machine without resorting to any legal process whatever, and all moneys paid on account of the said rent shall be forfeited, and shall not be accounted for by the said company. And further, that I will obtain or deliver to the said company a writing from the lessor of the premises where the said machine may be used or placed, that he the said lessor will relinquish all right and claim to the said machine, and will not seize or hold the same for rent of the said premises.

And the said company hereby agree at the expiration of the said term of nine months, to sell and deliver to the said A. J. McDonald the machine so hired as aforesaid, for the sum of one cent, provided the said A. J. McDonald has well and truly paid the said rent at the days and times herein mentioned for the payment of the same.

And it is expressly agreed by the parties hereto that this clause or agreement for the sale of the said machine shall not be binding on the said company in case the said A. J. McDonald shall not keep and perform all and every the promises and agreements herein contained, on the part of the said A. J. McDonald to be kept and performed.

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1882. In witness whereof the said parties hereto have hereunto subscribed
 their names this twentieth day of September, A. D. 1877.
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 CHARTERS. Signed in the presence of the above, having been read over by me
 to the lessee who seemed perfectly to understand the same.
 (S'd). T. U. GETCHELL.

I accept notice of the foregoing lease, and renounce all right to
 seize the sewing machine herein mentioned, or to obtain any privilege
 in the same for the present or future rent of the premises leased by
 me to the above-named lessee.

Dated the.....day of187.

McDonald paid \$15 and afterwards \$36 more, in all \$51 on
 the machine, and then gave the defendant a bill of sale of it.
 On his cross-examination McDonald stated that what Getchell
 said was that the machine was to be his when he paid the bal-
 ance, and that he had ample opportunity to read the writing if
 he chose to do so. Afterwards McDonald not having paid the
 balance the plaintiffs' agent took the machine from him, the
 defendant forbidding him, and the defendant afterwards took
 it from such agent, and afterwards and before action brought
 tendered to plaintiffs' agent the \$14 due, which he refused to
 accept, and brought this action. The judge left it to the jury
 to say whether the written lease was obtained by fraud, telling
 them that if Getchell fraudulently represented to McDonald
 that it was only an agreement to pay the price, as they
 had verbally agreed, to induce McDonald to sign it, that was
 evidence of fraud that they might consider. I think such
 direction was entirely correct. Indeed if McDonald's account
 of the transaction is correct, that is if he agreed to buy the
 machine for \$65,—\$15 down, and the balance in monthly pay-
 ments of \$6 each, and that to induce McDonald to sign a care-
 fully drawn lease of the machine purchased, by which not only
 was the property to remain the plaintiffs' until the whole was
 paid, but also containing an agreement that McDonald never
 made or heard of, that he had leased it at \$6 a month, and that
 such monthly payments were rent only, and if such rent was not
 paid on the very day it fell due, all the money he had paid, and
 the machine was the plaintiffs' and McDonald would have no

right whatever under it, the plaintiffs' agent falsely told McDonald that it was an agreement to pay the balance as agreed; this in my opinion was such a fraud as to render such writing void, and the rights of the parties would remain under the verbal agreement between them just the same as if no writing had been signed at all. The fact that McDonald was able, and had an opportunity to read the paper, would be a fact that the jury might consider to discredit McDonald's statement that the real agreement between them was different from what was contained in the writing, if the two parties had given different accounts of the transaction; but that is for the jury. In this case, by Getchell's own account, he does not pretend that there was any such agreement as that contained in the writing talked of between them, and he would not swear that the writing itself was ever read. Under such circumstances, what pretence can there be that McDonald ever assented to the terms of that writing, and is it not a gross wrong for him to write out an agreement that was never made and get McDonald to sign it, by telling him that it was the agreement they had made, when he must have known such statement was false?

The next question is, if this lease is void, whose property in law was the machine at the time this action was brought? In my opinion it did not belong to the plaintiffs at that time no matter whose account of the transaction is correct; but it belonged either to the defendant or to McDonald. It was agreed to be sold and delivered to McDonald for \$65, and it was to be his when he paid the fifteen dollars, or at all events when he paid the whole. McDonald paid all but \$14, and this the defendant tendered the plaintiffs' agent, which he refused to accept before action. If the property was to be McDonald's upon the payment of this sum which he agreed to pay, then when he performed his part of the agreement, that is, paid or tendered the full price, the property would be his. The plaintiffs could not prevent McDonald from performing his part of the agreement by refusing to accept the payment. All McDonald had to do to perform the agreement was to do all that was to be done by himself, and that was done when he or his assignee tendered the money to the plaintiffs or their agent.

A great deal has been said before us about this instrument

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being a bill of sale, but I do not see how that question can arise in the case, for if it contained the true agreement between the parties, and it was void by the Bills of Sale Act only, then no title would have passed [from the plaintiffs to McDonald, and the property would still be in the plaintiffs. Such an instrument, if it had been made as a *bona fide* leasing of the goods, and what was contained in it was the true and only agreement between the parties, it would not I think be a bill of sale within the Act because no sale would have been intended, but only that the plaintiffs would be obliged to sell upon certain things being done at particular times, and in the meantime it was simply a demise of it at a real rent; the fact that this was not the real transaction in this case but this was intended by both parties to be a sale and no demise of it was ever agreed to by McDonald, and that the real bargain was that the plaintiffs agreed to sell and McDonald agreed to buy, and that the price should be paid partly down and partly by instalments, but all as purchase money even although it was understood that it should remain the property of the plaintiffs until the whole purchase money was paid; and the plaintiffs' agent after receiving the \$15 as agreed pretending to prepare a writing setting out the real agreement, deliberately prepared an agreement of an entirely different nature, and one which I think no man in his senses would make, shewing that McDonald had agreed to pay rent instead of purchase money, and the plaintiff was only bound to give McDonald the title in case every payment was made on the very day it fell due. Then to induce McDonald to sign it, to falsely tell him that it was an agreement to pay the purchase money as agreed, I think that under such circumstances the jury had a perfect right to infer that the plaintiffs' agent knew such statement was false and made to induce McDonald to sign without reading, although he had ample opportunity to do so, and is I think good evidence of fraud to vitiate such agreement, and the transaction stands as though the writing was never made; and the real parol agreement and the payments made under it operate, and as I have already said, take the property out of the plaintiffs, on payment or tender of the whole price agreed to be paid, it follows that the defendant's judgment in the Court below should stand.

KING, J. I am of the same opinion.

The instrument executed by Getchell and McDonald is very similar to that which in *Crawcour v. Salter*¹ was held to be a mere hiring agreement and not a bill of sale. If then the parties intended a transaction of sale and purchase the instrument did not express their true intention, and if McDonald was led to execute it by fraudulent misrepresentations of its character made by plaintiffs' agent, the fraud so attaching to the instrument vitiates it. Then if the instrument is avoided what is the position of the parties? It is said in *Leake on Contracts* p. 397 that if the party defrauded elects to avoid the contract in fact made he cannot charge the other party with any other contract, as presumptively or impliedly arising out of the transaction, but he is merely remitted to the remedies for the fraud, and for the recovery of his property, in this case the money paid under the contract. Here however there is some evidence outside of the instrument of an express contract of sale and purchase, all the terms of which can be made out independently of the written instrument, and there is also a delivery and acceptance of the goods and part payment of the price, and when the written instrument which purported to be, and was intended (by one of the parties at least) to be the record of the transaction is avoided for fraud, the transaction itself may be supported on proof of the original express contract. This is not to make a contract for the parties, but is simply to give effect to the contract in fact made by them.

WETMORE, J. The plaintiffs claim the machine in question was their property, and was leased to one McDonald for nine months at \$6 per month, payable in advance: in default of any payment plaintiffs to be entitled to take possession of it; McDonald failing to make payment of the rent or to perform any of the various provisions in the alleged written agreement, was to forfeit all claim to the machine and all payments made. The alleged agreement which was signed by McDonald was a most particular and stringent one, and if the transaction between McDonald and the plaintiffs was as alleged by the plaintiffs and stated in the signed paper, no doubt the plaintiffs would be entitled to recover. McDonald gives a very different version of the matter: he says the machine was sold and delivered to

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¹L. R. 18 Ch. D. 80.

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him under a verbal agreement by which the property was to be his immediately. He was to pay \$15 down, and the balance in monthly payments of \$6. Under McDonald's statement, if true, the machine passed to him; he alleges he paid the \$15, and had subsequently paid in instalments \$36, in all \$51. McDonald says the plaintiffs' agent wished him to sign a paper which the agent said was an agreement to pay the balance by instalments of \$6 a month; that neither McDonald or the agent read it, and he (McDonald), though he had full opportunity to read it, took the agent's word as to the contents of paper, and signed it, believing it was, as represented, only an agreement to pay \$6 instalments monthly.

It was contended that the agent fraudulently and by misrepresentation induced McDonald to sign a paper representing the agreement to be entirely different from what it really was. The question of the fraudulent representation was left to the jury, and they found that the agent did fraudulently misrepresent the contents of the agreement, and that the agreement was as McDonald stated. So far as the property would be McDonald's he transferred it to the defendant by a bill of sale which was registered. Previous to bringing the action, the balance, \$14, due on the machine, was tendered to the plaintiffs by the defendant. The tender of the \$14 I do not think affects the case under the finding of the jury.

A point was made by the defendant's counsel respecting the non-registry of the document given by McDonald to the plaintiffs, he contending it was invalid against the defendant in consequence of its not being registered; but as the jury by finding the document was obtained by fraudulent representation and therefore void, in fact that there was no legally existing document to register, any decision as to the necessity of registering it is unnecessary.

The jury, under what I think was a proper direction of the learned County Court Judge, have found the alleged agreement under which the plaintiffs claim, to be a fraudulent operation, and therefore void, and that the machine was sold and delivered as testified to by McDonald, I see no reason for disturbing the verdict. The appeal I think should be dismissed with costs.

ALLEN, C. J. I agree, though with some doubts, that this appeal should be dismissed.

I am not satisfied that McDonald, who agreed with Getchell for the purchase of the sewing machine, did not know exactly the nature of the writing which he signed; that it was only a conditional agreement of sale, and that the property was not to be his till the whole price was paid. He admitted that he could have read the paper if he had chosen; and his evidence of what Getchell said about the property being his, is contradictory and unsatisfactory. However, the jury have found that Getchell did misrepresent the contents of the writing, therefore no question can now be raised on that point.

I do not see that the tender of the \$14 by the defendant strengthens his case. If the property in the machine did not pass to McDonald till the whole price was paid, there was a wrongful conversion by the defendant when he forcibly took it from the plaintiffs' agent, and his afterwards tendering the \$14, would not relieve him from liability for his wrongful act, though the plaintiffs might only be entitled to recover nominal damages. I should have been better satisfied if we had power to order a new trial in this case. (a).

WELDON, J. I concur in the judgments of my brothers Palmer and King.

Appeal dismissed with costs.

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March.

Equity—Appeal papers—When to be printed—Entry of cause—Application to strike cause off docket—Rule of Hilary Term, 1881—Practice.

The Court (WELMORE, J., dissenting) refused to strike a cause off the Equity Appeal paper by reason of the appeal papers not having been printed and filed as required by rule of Hilary Term, 1881, when good cause was shewn for the delay.

On the first day of the present term, *T. C. Allen* moved on behalf of the respondents to strike this cause off the Equity Appeal Paper, on the ground that the appeal papers had not been printed and filed with the Clerk, as required by Rule of Hilary Term, 1881. A rule *nisi* having been granted, on

(a) See *Lewis v. McCabe*, 21 Am. Law Reg. 217, as to conditional sales.

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February 18th, *E. L. Wetmore, Q. C.*, shewed cause, and read an affidavit of the appellants' solicitor, stating that the appeal papers had not been printed owing to inability of the printers who were engaged to do the work. The notice required by Consol. Statutes, c. 49, sec. 61, was properly served on the respondents' solicitor; and under the rule of Easter Term, 1881, he contended the Judge was right in granting an order that the cause be set down for hearing on the appeal paper of the present term. The case could not be dealt with until reached.

Dixon, contra, contended that the affidavit read had not shewn sufficient excuse for the delay in printing and filing the papers. Fourteen days having elapsed between the settling of the minutes and the first day of the present term, the cause must be entered on the appeal paper: Consol. Statutes, c. 49, sec. 61. But the rule of Hilary Term, 1881, expressly requires that no entry shall be made until the appeal papers have been printed and filed with the clerk. The Court should be astute to have its own rules strictly adhered to. If through any unavoidable cause the papers were not printed, application should have been made on the first day of term for further time. No such application had been made.

Cur. adv. vult.

The following opinions were now delivered:

ALLEN, C. J. We think the application to strike this cause off the appeal paper should not be granted.

WETMORE, J. This application is to strike this cause from the docket by reason of the appeal papers not having been printed and filed with the Clerk of the Pleas in pursuance of the rule of Hilary Term, 1881, 44 Vic.

By the rule of Trinity, 31 Vic., (1868), whenever an appeal is made from a Judge in Equity the Court may order the whole or any part of the pleadings, evidence, judgment, or other proceedings to be printed. The rule of Hilary, 44 Vic., is that all appeals from a Judge in Equity and all special cases be printed and filed with the Clerk of the Pleas before the opening of the Court on the first day of the term at which such cases are to be argued; and that copies for each of the judges be filed with the clerk at the same time; and that until such appeals and special cases are so filed, no entry thereof

shall be made on the respective papers. This latter rule seems to supersede that of Trinity, 31 Vic., as it specifically requires appeals and printed cases to be filed in all cases before the appeal can be entered, while the former only authorizes the Court to direct the whole or any part of the proceedings, etc., to be printed, which order, I apprehend, the Court could make at any time pending the appeal.

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The minutes of the decree were settled more than fourteen days before the first day of Hilary, so that under sec. 61, cap. 49 Consol. Statutes, the appeal required to be entered the first day of Hilary. The wording of the Act is, "and such appeal shall be heard at the term next after the settling of such minutes provided fourteen days have elapsed between the settling of such minutes and the first day of the term." The necessary notices were given. The cause was set down for hearing at the present Hilary under rule 2 of Easter, 1881, (44 Vic.) by the Equity Judge and everything necessary to complete the entry was perfected except that the appeal papers were not printed and filed as required by the rule of 44 Vic. Cause was shewn against the application and it very clearly appeared that the necessary papers could not reasonably have been printed in time to file previously to the actual entry of the cause, and I think it may very fairly be conceded that such circumstances were put forward as that on a proper application being made the first day of term the Court would have given further time to enter the cause or file the necessary printed papers. No such application, however, was made.

It was contended the rule of Hilary, 44 Vic., was in contravention of the provision of sec. 63, cap. 49, and so far inoperative. Sec. 63 is, "in all cases of appeal it shall be the duty of the appellant to have all pleadings, evidence and papers necessary for the purposes of the appeal printed *in time* for the appeal to be argued at the Term at which it is set down for that purpose, and the Court shall dismiss such appeal if such pleadings, evidence and papers are not *so printed* unless good cause be shewn for the delay." On this section it was argued that if the printed papers were filed at any time before the appeal was actually called on for argument, there was full compliance with the Statute and the rule of Court could not

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be allowed to contravene the 63rd section, and its direction requiring the papers to be printed before the cause was entered, must be disregarded. The Statute does not say to file the papers in time for the argument, nor does it state any specific time for filing them, it only says in time for the appeal to be argued at the term at which it is set down for that purpose.

- The rule does say what that time is, namely, before the opening of the Court on the first day of the Term. The Judge's order directed the setting down of the cause for hearing at Hilary, it was noticed for argument and the Statute required the papers to be printed in time for hearing at Hilary—that time, by the practice of the Court, as established by the rule, was before the opening of the Court on the first day of Term. To be filed in time to be argued at the term at which it was set down for hearing, required the filing of the papers to take place before the opening of the Court on the first day of the Term—if not so filed the papers would not be filed in time to be so heard. I think it very reasonable to infer that the Legislature in enacting that the papers should be printed in time for the hearing of the appeal, meant according to the practice of the Court. I cannot see that there is any want of harmony between the 63rd section and the rule. No entry is allowed by the rule unless such appeals are filed as it directs. The Statute says the appeal shall be dismissed if such pleadings, evidence and papers are not so printed (which I have endeavoured to shew reasonably means according to the rules and practice of the Court) unless good cause be shewn for the delay; the rule and the Act, I think, can be worked together in perfect harmony. But suppose they cannot be so worked, by sec. 3rd of the Act “the Court may and they are hereby required from time to time to make such general rules and orders as may be necessary for carrying the purposes and provisions of this chapter into effect and for regulating the times, forms and mode of procedure and practice of the said Court; and the judges of the said Court, or a majority of them, may and are hereby empowered by any such general rule to rescind, alter, add to or amend any of the provisions of this chapter relating exclusively to the practice or mode of procedure in the said Court.” This section expressly gives power to the judges to

regulate the times, forms, etc., and why should the Court under this section not have power of fixing the time for filing the printed papers; but if the rule is expressly in contravention of section 63, what is to prevent the Court making the rule under the latter part of section 3, as it relates exclusively to the practice or mode of procedure in the said Court.

I do not see that the rule contravenes the 63rd section, but if it does I think the Court has power to make it under section 3. If there was good cause for extending the time for filing the papers, under section 63 all the appellants had to do was to ask for an extension of time which the Court would of course grant upon a proper application.

The application for further time should, I think, emanate from the appellant, he should not lay by until the hearing of the respondent's motion to strike the cause from the appeal paper, if he does, the Court might not then be disposed to grant it. The payment of the costs of the motion should be required. It is a very easy matter for the appellant to apply for time if he has good cause therefor. If the time is not worth applying for it is not worth having. The rule is perfectly clear and I think is a very proper one, and I will state why I think it a proper one by supposing a case, and one not unlikely to happen unless this rule is enforced. That of a suitor having a decree against him which he wishes to delay the operation of, at the same time not having the least idea of prosecuting an appeal or going to the expense of printing the necessary papers. Under sec. 61 he gives the requisite notice to the opposite party and to the judge who, under rule No. 2 of Easter, 44 Vic., is then obliged to make an order for hearing and the clerk would be bound to enter the cause without any papers being filed, and there it remains until called on for argument and is then dismissed in consequence of the papers not being filed. In the present state of the docket it is difficult to say what serious length of time might elapse before the cause is reached, or what disastrous consequences might arise in consequence of the decree not being carried out. If the rule is upheld this could not happen, the cause, if the minutes were settled fourteen days before the term, would have to be entered the first day of next term, this could not be effected

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without having the necessary papers filed, and there would at all events be a certain guarantee of the appellant's sincerity, namely, the expense of printing the necessary papers. Though the appeal may be no stay of proceeding in the suit, still it is hardly fair a party should have to go on with a suit in the face of an appeal without the protection of the rule when it can so readily be afforded.

If the appeal is really a sincere one no difficulty could arise by reason of the want of time to print the papers, for the appellant on affidavit could apply for what time he wanted and the Court would as a matter of course give him whatever time he shewed good cause for asking.

I cannot see the prudence of making a clear and positive rule one term and the next, or a few terms after, and after consideration too, ruling directly contrary to its provisions, in fact, entirely ignoring it. Such a course tends to unsettle the practice, and to my mind, very seriously impairs the consideration the rules of this Court are entitled to and should and would otherwise receive. While the rule is in force let it be acted upon. If its provisions are imprudent, repeal or alter them. This application, I think, should succeed unless the Court grant time for filing the papers on payment of costs.

WELDON, J. The rules and the Statutes are a little in conflict, but I must adhere to the law. I think the application should be refused.

PALMER, J. The question in this case is the practice on appeal from the decision of a Judge in Equity under the 61st section of chap. 49 of the Consol. Statutes, where fourteen days have elapsed after the settling of the minutes and the next term of the Court, and the appellant has not had time to print the case. This question depends upon the section referred to and the 63rd section, a general rule made in Hilary Term, 1881, and another like rule made in Easter Term of that year, to construe these I think they must be all read together, and if they conflict the Statute will operate and the rules fall, as far as they so conflict. The part of the 61st section affecting this matter enacts as follows: "And such appeal shall be heard at the term next after the settling of such minutes, provided fourteen days have elapsed between the settling of such

minutes and the first day of the term. If such minutes are not settled more than fourteen days before the first day of the term, the party intending to appeal shall enter the same on the appeal paper of the term next after the settling of the minutes, but the hearing of such appeal may be postponed until the second term thereafter by order of the judge, which shall be made, unless good cause is shewn to the contrary, and such order may direct the time of serving the grounds of appeal." The 63 section enacts "that in all cases of appeal it shall be the duty of the appellant to have all pleadings, evidence and papers necessary, etc., printed in time for the appeal to be argued at the term at which it is set down for that purpose, and the Court shall dismiss such appeal if such are not so printed, unless good cause is shewn for the delay." Before this Statute was passed there were rules of this Court directing that all such appeals should be entered upon an appeal paper; then the rule of Hilary Term, 1881, was ordained which is as follows: "That all appeals from the decision of a Judge in Equity, etc., be printed and filed with the Clerk of the Pleas before the opening of the Court on the first day of the term at which such cases are to be argued, and that copies for each of the judges be filed with the clerk at the same time, and, until such appeals are so filed, no entry thereof shall be made on the respective papers." And the rule made in the Easter Term following is as follows: "Whenever a judge receives notice of appeal under the 61st section of chap. 49 of the Consol. Statutes, he shall, on the application of either party, order the same to be set down for hearing at the term of the Supreme Court next after such application, and the Clerk shall thereupon enter the same upon the proper paper, and the same shall be heard when reached, and if not then prosecuted, such appeal shall be dismissed with costs, unless the Court shall, upon good cause shewn, postpone the hearing of such appeal."

The first thing to ascertain is what is the effect of the Statute operating on the practice of the Court at the time it passed. It says that the appeal shall be heard at the next term after the minutes are settled. I think this can only mean that it should be entered on the proper paper of that term and heard when reached, unless such hearing was postponed for good

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cause. That it could not mean that the cause should be absolutely disposed of in the then next term in all cases, for this would often be impossible from the Court not being able to get through the business that preceded it, and it is also apparent from the 63rd section, by which the appellant is to be allowed further time to print the papers, before the cause is argued upon good cause being shewn. I therefore think that what is meant is that unless the minutes are settled fourteen days before the term, the cause must be entered on the proper paper for hearing at that term, and the case printed in time to be argued, that is before it is reached, and if not reached, at all events, during the term. If this is not done the respondent is entitled to move to dismiss, which is done if no good cause is shewn for the delay. If I am right in this, it follows that the part of the rule of Hilary that directs that no entry of the appeal can be made on the paper until the case is printed, conflicts with the Statutes, and it is therefore void *pro tanto*, and it appears to me that the whole of that rule conflicts with the Statute, for how can a printed copy of the case be filed before the opening of the Court at the term in which the cause is to be argued, when the Statute directs that it may be printed in time for the case to be argued, and even after that, and after the whole of that term, upon good cause being shewn?

The rule of Easter is useful as settling the practice to have the appeal dismissed either under the 63rd section when the case is not printed or where the appellant fails to appear and support his appeal when reached, and also to get it on the paper when the appellant neglects to do so. Upon the whole, I think the proper practice is for the appellant to procure an order under the rule of Easter to set the cause down for hearing at the next term after the settling of the minutes, and when they are settled, fourteen days before such term, to be diligent and get the case printed and the proper number of copies filed before it is reached to be argued, and at all events, during that term, even if not reached, if he does not do this when so reached, the respondent can move to have the appeal dismissed, which will be done unless the appellant shews good cause under the 63rd section why the case has not been printed.

If the case has been printed and the appellant does not appear to support his appeal, it will be dismissed under the rule of Easter, unless good cause is shewn to the contrary. The above construction of the Statute and rules, in my opinion, makes a reasonable and convenient practice, and under it, it will only be necessary for an order to postpone the hearing of an appeal until it is reached, when the minutes are settled less than fourteen days before a term.

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But it is argued that section 3rd of chap. 49 of Consol. Statutes authorizes the Court by general rule to repeal any of its provisions as far as they relate to practice or the mode of procedure. Without discussing how far it was competent for the Legislature (who alone had power to legislate on the subject) to delegate such power to the Court, or whether the rule of Hilary Term, before referred to, does by implication repeal so much of the 63rd section which gives the whole term to print the papers and that the Act and not the rule should fall. If the rule stands I think the effect would be to repeal the Statute *pro tanto*, and would have a much greater effect upon it than merely altering the practice or mode of procedure, for it would deprive a party of the absolute right to appeal in many cases. Suppose the minutes settled sixteen days before the term, each party has twenty days after in which to appeal, consequently the notice need not be given until after the first day of the next term, and if so it would be impossible to print the papers before the term for this notice is one of the papers that must be printed. By the the 61st section of the Act the appeal must be entered at the next term, which can be done, if the party is allowed to do so, without printing, but the rule declares that appeals shall not be entered until printed.

I also think that if the Court had the power to repeal the part of the 63rd section referred to, by general rule, they have not done so. I do not think the rule was ever intended to alter, conflict with or repeal any part of the Statute, for before I would infer the Court intended that, I would require the rule to say so in plain terms. The rule in no way mentions the section referred to, and I think it must have been made improvidently without thinking of the provisions of the section, or that the rule conflicted with it, and as the Court has power

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to disregard its own rule and the rule conflicts with the Statute, we can and I think must be governed by the Statute and not by the rule where they are in conflict. If the Legislature had power to delegate its power of repealing acts to any body, I apprehend such delegated power must be exercised in strict conformity with the power so given, and it is a rule that when it can be inferred that the power was not intended to be exercised, the Court cannot consider this to have been done: see *Brookman v. Hales*,¹ and I think I may fairly infer that if this Court ever intended to repeal any part of the Statute they would have said so in plain words and not left it to be inferred by doubtful implication.

KING, J. I agree with the majority of the Court.

Application refused.

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Stamp Act (42 Vic. c. 17)—Double stamping under Sec. 13 & 25—Holder—Reasonable time—Insolvent Act Sec. 136—Liability under.

Defendants drew a bill of exchange in three parts on 8, in Liverpool, payable to their own order, indorsed it, and sent it to the plaintiffs' manager with a letter requesting him if agreeable to place it to defendants' credit at best rates possible, and also requesting the manager to put on necessary stamps and deduct from proceeds. Stamps were put on the bill in the bank, but it did not appear by whom, and they were not cancelled. The bank discounted the bill, and the defendants received the proceeds. The bill was not accepted; and in an action by the bank against the drawers, the 1st count of the declaration stated, in addition to the usual allegations of drawing and dishonor of the bill, that the defendants falsely and fraudulently represented that they had a right to draw it, whereby the plaintiffs were induced to discount it, and to advance the defendants money upon it. The plaintiffs having failed to prove the count on the bill—

Held, That as the charge of fraud was alleged to have been in reference to the money obtained by the defendants on the bill, they were not liable under section 136 of the Insolvent Act, though the plaintiffs obtained a verdict against them for the same demand on a count for money lent.

On the trial, only one of the parts of the bill was offered in evidence, and objection having been taken to the stamp, the manager of the bank proved that he had no knowledge of the defect till then. The evidence to disprove knowledge and the arguments of counsel extended into the second day of the trial, when a double duty stamp was affixed to the bill, and it was received in evidence.

Held, per ALLEN, C. J., WETMORE and PALMER, JJ., (KING, J., dissenting). That the manager of the bank having only a limited authority to issue the bill when properly stamped, and the stamping being insufficient, the defendants were not liable.

Per ALLEN, C. J., That section 13 of the Stamp Act (42 Vic., c. 17) authorizing the affixing of double duty stamps, did not apply, where the holder of an unstamped bill received it from the drawer with instructions to stamp it.

Per ALLEN, C. J., and WELDON, J., That where a banking company becomes the holder of an unstamped bill with instructions to stamp it, and they do it insufficiently, they are precluded by section 25 of the Stamp Act, from rectifying the error by affixing double duty stamps at the trial, though they have not been previously aware of the defect.

Per PALMER, J., 1. That under section 25, it was the duty of the bank to affix the double duty stamps at the first reasonable opportunity after discovering the defect; and it was too late to do so on the trial on the second day after the defect was brought to their knowledge. 2. That if double duty stamps could be affixed, it was sufficient to affix them to the part of the bill offered in evidence.

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This case was tried before King, J., at the St. John Circuit in March, 1881.

The declaration contained a count on a bill of exchange drawn by the defendants to their own order on P. Sutherland & Co., of Liverpool, for £400 at ninety days, against a shipment by a vessel called the *Nina*. In addition to the usual allegations, this count contained a charge under the 136th section of the Insolvent Act of 1875, alleging that the defendants falsely and fraudulently represented that they had a right to draw the bill, whereby the plaintiffs were induced to discount it, and to advance the defendants money upon it. The declaration also contained the common counts. The plaintiffs failed to prove the count on the bill of exchange, and His Honor told the jury that the fraud was not proved. A verdict for \$2143.43 was taken for the plaintiffs by consent, subject to leave reserved to the defendants to move to enter a nonsuit or verdict in their favor. The facts are fully stated in the judgments.

October 15th, 1881. *Weldon, Q. C.*, was heard in support of the motion to enter a nonsuit or a verdict for the defendants.

The first part of the bill was offered in evidence after having the whole amount of the double duty affixed to it. It was not shown that other parts were properly stamped. [PALMER, J., If that part was properly stamped, would it not be fair to presume that others were?] Probably it would: but if, as in this case, the part offered was shown to be improperly stamped that presumption would be gone. *The Marine Investment Co. v. Haseide*.¹ It would not do to put a stamp sufficient for the whole bill on one part when it was drawn, but each part must have the proper stamp on it, and if not properly stamped, each part must have the proper double duty stamp put upon it. Stat. of Can. 42 Vic., cap. 17, secs. 4, 10, 11, 12, 13.

¹L. R. 5, H. L. 624.

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Plaintiffs could not double stamp in any case: the Act only authorizes a holder who has no knowledge of the defective stamping to double stamp. The plaintiffs were the parties who were to stamp in the first place, and as a matter of law they must be conclusively presumed to have known of the defective stamping.

The double stamping was too late under section 25th of the Stamp Act. The bank were bound to stamp immediately upon knowing of the defect. "Knowing" in this section, means having the means of knowledge.

If the bill was not properly stamped, it is not available for any purpose, and cannot be given in evidence to support the common counts. There was no other evidence under the common counts, and defendants were entitled to a nonsuit.

15th and 17th. *Geo. G. Gilbert, Q. C., contra.*

The plaintiffs were not parties to the bill until after it was stamped. Taylor, the plaintiffs' manager, acted as the agent for the defendants in putting on the stamps, and there is therefore no presumption of law that the plaintiffs knew of the defective stamping. It was proved that, as a matter of fact, they had no knowledge of the defect until their attention was called to it at the trial, and they then had a right to double stamp: *Curran v. Morgan*.¹ The time when the double duty must be paid is the same under both section 13 and section 25, that is, within a reasonable time after knowledge of the defect. In this case the double stamps were put on within a reasonable time after knowledge. The time which elapsed between acquiring knowledge of the defective stamping, and the putting on the double duty stamps, was occupied in arguing the question raised as to our right to double stamp, and in shewing the plaintiffs did not know of the defect until their attention was called to it at the trial. The Judge had to be satisfied on these points before the double duty stamps could be put on: *Leonard v. Foshay*.²

It was sufficient to double stamp the part held by the plaintiffs. The Act is remedial and should have a liberal construction. If it were held necessary to stamp each part, holders would be practically deprived of the relief which it was the

¹ 3 Pug. 641.

² 3 Pug. 662.

intention of the Act to give them, for the double stamps must be put on immediately the defect is discovered, and the party suing does not usually hold more than one of the parts.

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The learned Judge was wrong in withdrawing from the jury the questions of fraud and false pretences under section 136 of the Insolvent Act, and in refusing to allow the plaintiffs' counsel to address the jury on those questions. There was evidence that the defendants falsely represented that they had a right to draw the bill against the cargo of the ship *Nina*, and that in consequence of their representations they received the money. If the fraud is proved, and the plaintiffs are entitled to recover on the common count, they have made out a case under the 136th section of the Insolvent Act. The allegation of fraud may be applied to any count.

Weldon, Q. C., and Tuck, Q. C., contra.

The plaintiffs aver that the defendants obtained the money on the bill of exchange by false and fraudulent representations. Before they can recover for the fraud, they must prove this averment. This can only be done by putting the bill in evidence, which, owing to the defective stamping was not available for any purpose. *Byles on Bills*, 473 (13th ed.); *Jardine v. Payne*;¹ *Jones v. Ryder*;² *Jones v. Hanford*;³ *Barry v. Hegan*.⁴

Cur. adv. vult.

The following judgments were now delivered:

PALMER, J. The first question in this case is, whether the bill of exchange in question was binding on the defendants under the provisions of the Dominion Act 42 Vic., chap. 17, commonly called the Stamp Act. The facts of the case, as far as I think them material to determine this question, are as follows:—The defendants wrote the bill, signed it, but did not stamp it, and inclosed it to the plaintiffs in a letter addressed to their manager at Saint John, authorizing him to affix and cancel the necessary stamps, and then discount it with the plaintiffs and place the proceeds to the credit of the defendants in the bank. The manager placed the proper stamps upon the bill, but did not cancel them, by putting the drawer's initials or the date upon them as required by the Act. No doubt he

¹ 1 B. & Ad. 663. ² 4 M. & W. 32. ³ 2 Pug. 467. ⁴ 2 P. & B. 465.

1862. intended to do so, but forgot it. He delivered the bill in that
THE BANK OF state to the bank, who discounted it, and placed the proceeds
NOVA SCOTIA to the defendants' credit as directed. The bank forwarded the
v. bill to Liverpool for acceptance, which was refused. At the
CUSHING. trial, one part of the bill was produced and offered in evidence
before noon of the first day of the trial, when it was discovered
that the stamps were not marked on such part. Considerable
discussion and evidence were offered in relation to the omission.
Matters remained in this state until the next day about eleven
o'clock in the forenoon, when the plaintiffs decided to, and did
put on the double stamps required by the 12th section of the
Act.

The bill was in three parts, one of which only was produced
at the trial, and to that the whole of the amount of the double
stamps was affixed, and the question is, whether under these
circumstances, the defendants are liable as drawers of this bill.
The 12th section of the Act referred to, in effect enacts as fol-
lows: "That if any person makes, draws, &c., any bill of ex-
change, chargeable with duty (which this was), before the duty
has been paid by affixing the proper stamps, such person shall
thereby incur a penalty of \$100, and such bill shall be of no
effect in law or in equity. But no party to, or holder of any
such instrument, shall incur any penalty by reason of the duty
thereon not having been paid at the proper time, and by the
proper party, provided that at the time it came into his hands
it had affixed to it stamps to the amount of the duty apparently
payable upon it, and that he had no knowledge that they were
not affixed at the proper time. and by the proper party, and
that he pays the double duty provided by the next section." I
think it is plain, under this section, the penalty would be in-
curred if the stamp was not affixed before the draft was drawn.
That being the law; when the defendants in this case wrote
out the paper writing in the form of a bill of exchange, signed
and sent it to the manager of the bank, and in writing author-
ized him to properly stamp it and then discount it; they in effect
authorized such manager to draw the bill and put it in circula-
tion as their agent. It surely ought not to be inferred that they
roke the law and incurred the penalty, or intended to do so.
think I am bound to infer that they never intended or author-

ized the bill to be drawn: that is, as I understand it, part with it to the payee or indorser until it was properly stamped, and only when so properly stamped was the manager authorized to do so. And when such manager, as the defendants' official agent in that behalf, with only that limited authority, whether intentionally or not, attempted for the defendants to issue, or in other words to draw the bill, to bind them without properly stamping it, he had no authority to do so, and it cannot bind them at all. In my opinion they have a perfect right to deny both in this action, or in any proceeding for the penalty, that they ever drew the bill or authorized it to be drawn as it was drawn; and, in fact, all they did was to authorize their agent, who had no authority otherwise, to do it in a special manner, by stamping it, which authority he did not, as he was bound to do, pursue. In fact he did an act for the defendants, professing to act as their agent to discount this bill, which if they had authorized it, must have made them liable for the penalty. The law on this subject is fully discussed in *Attwood v. Munnings*;¹ *Bank of Bengal v. Macleod*;² *Fearn v. Filica*;³ where it is expressly laid down that where a special agent has only authority to make, endorse, or issue bills of exchange, and he does so, but not in the way authorized by his principal, such principal is not liable on such bills, even in the hands of an innocent indorsee for value. This being my opinion, it is unnecessary for me to discuss the further questions raised in the case: whether the putting the double stamps on so long after the discovery of the mistake, or whether they could be all put on one part of the bill. However, I may say that I think they could all be put on one part—all the parts together only make one bill and one instrument, and the 13th section enacts that the holder may affix the double duty to such instrument; unlike the putting the duty on in the first instance under the 4th section, which requires them to be put partly on each. And there is reason for this, for at that time all the parts would be present, and it could be done; but a holder may often have received only one part when he discovers the bill was not properly stamped.

On the other point: the 13th section allows him to put

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¹ 7 B. & C. 378.² 7 Moore P. C. 36.³ 7 M. & G. 513.

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on the double duty as soon as he acquires the knowledge of its not being properly stamped; and the 25th section enacts in effect, that notwithstanding any thing contained in the Act, any bank that receives, or becomes the holder of any instrument not properly stamped, who does not immediately on receiving or becoming the holder properly stamp it shall not recover on the instrument. Whether or not this means that the bank shall stamp on receipt, even although they did not know of the defect, or that the fixing of the stamps when they made the discovery would be a proper stamping within the meaning of the Act or not; it is clear, at all events, that it must be done immediately on such discovery; and we are called upon to say what is the meaning of this word "immediately" in this section. The rule laid down for construction of statutes is: That all words found therein must have their ordinary, popular and grammatical meaning, unless there is something in the context to shew that some other meaning is intended. Adopting this rule, I think this word meant that the person to stamp should at once make up his mind to do so, and take the ordinary method reasonably to accomplish it: thus, if it was discovered on Sunday, or out of business hours, I think they would have a right to wait until the usual business day and business hour to do it; and if the person was engaged in some other matter that would delay him only a short time, or the bill or the stamps could not be got at for some time, all that would be necessary would be to do it when it reasonably could be done. On the other hand, I think that unless the bank proceeds to stamp at the first reasonable opportunity for so doing, according to the usual course of the business of human affairs, they do not do so immediately; and more particularly do they not do this, if they do not at once recognize and admit the necessity of it; and if instead, think over the doing what the statute says they must do immediately, and mistake what the statute does require, and for that reason do not do anything required by the statute, or if they think they can enforce payment without complying with the statute, and expend a day in trying to do this, and then after the lapse of a whole day double stamp, not think that I can say that they did so immediately. It follows, that in my opinion, this bill is not valid. I think, never, that the money the defendants got from the

bank is recoverable on the common counts, and a verdict should be entered for the plaintiffs on these counts, and for the defendants on the special count; and as there is no allegation of fraud in such common counts, and they have not recovered on the count in which fraud is alleged, the defendants cannot be convicted of fraud in this action.

WELDON, J. The question which arises in this case is upon the stamping of the bill of exchange drawn by the defendants upon Peter Sutherland, jun. & Co., payable to them or their order, and indorsed to the Bank of Nova Scotia.

[His Honor then stated the circumstances under which the stamps were affixed to the bill.]

The defendants contend such stamping did not render the bill of exchange valid under the Stamp Act, section 4 of which requires the stamps to be placed on each part of a bill of exchange executed. If in more than two parts, a duty of one cent on each part for the first \$100 of the amount thereof, and a further duty of one cent for each additional \$100. The 10th section also requires the person affixing adhesive stamps, or the witness attesting the same, at the time of affixing the same, to write thereon the date at which it was affixed, for the purpose of cancelling the same. The 11th section directs by whom such stamps shall be affixed, and imposes a penalty on the maker, drawer, or first indorser failing to affix such stamps. The 25th section declares that—

“Any bank, or any broker who makes, draws, or issues, or negotiates, or becomes the holder of any instrument not duly stamped, either as a deposit, or in payment, or as a security, or for collection or otherwise, knowing the same not being duly stamped, and who does not immediately on making, issuing, negotiating, or presenting for payment, or paying, or taking, or becoming the holder of such instrument affix thereto and cancel the proper stamps within the meaning of this Act, shall incur a penalty of five hundred dollars for every such offence; and shall not be entitled to recover on such instrument, or to make the same available for any purpose whatever, and any such instrument shall be invalid and of no effect in law or equity.”

The bill of exchange being in three parts, and not duly stamped according to the provision of the said Act, cap. 17, how can the plaintiffs in the face of this Act recover against the defendants the amount of this protested bill taken by the plaintiffs and negotiated and caused to be presented for accept-

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ance and payment, and protested for non-acceptance? The placing thereon at the trial of this cause double stamps under the 13th section of the Act does not assist the plaintiffs, for they do not bring themselves within the meaning of the proviso contained in the 12th section of the Act. Nor can the plaintiffs avail themselves of the proviso in the 13th section of the Act, as that proviso does not extend to bankers or brokers; but the 25th section makes the instrument invalid in their hands, and of no effect in law or equity, unless they immediately on receiving or becoming the holders of such bill affix thereto and cancel the proper stamps according to the said Act.

The bill of exchange produced in evidence in this cause was not stamped and cancelled according to the Act, and therefore the bank could not make it available for any purpose whatever. I am therefore of opinion the learned Judge was right in rejecting the evidence to shew any money paid by virtue of, or under that bill of exchange. The cases of *Street v. Quinton*, *Curran v. Morgan*, and *Leonard v. Foshay*, were all decided before the passing of the Act 42 Victoria, cap. 17. Nor were the plaintiffs or either of them in those cases, bankers or brokers. I do not think the return from the Insolvent Court was properly admitted to sustain the money counts. The bill of exchange which was invalid was included in that return.

I am of opinion that a nonsuit should be entered.

ALLEN, C. J. I think the plaintiffs are not entitled to recover on the counts on the bill of exchange, for three reasons:—1st. Because the defendants never authorized them to issue the bill till it was properly stamped. 2nd. That the plaintiffs were not such holders of the bill as were authorized to affix the double duty stamp, within the meaning of the 13th section of the Stamp Act. And 3rd. Because the plaintiffs received the bill knowing it not to be duly stamped, and did not immediately on receiving it affix the proper stamp.

When the defendants sent the bill to the plaintiffs, and authorized them to put the stamps upon it, and send it to England for acceptance, it was their duty not only to affix stamps of the proper value, but to cancel them, as directed by the 10th section of the Act, so as to make it a legal instrument; and when they issued the bill without such cancellation, they exceeded

their authority and the defendants would not be liable to them on this bill. Though the manager of the bank, to whom the bill was sent with the request to put the stamps on it, did not himself affix the stamps, but probably directed it to be done by a clerk, the bank must take the responsibility of his omission to cancel the stamps.

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In addition to this, I think the plaintiffs were not authorized under the 13th section of the Act to affix double duty stamps at the trial. The 12th section imposes a penalty upon any person who makes, draws, indorses, becomes a party to, or pays any promissory note, draft or bill of exchange chargeable with duty, before it is properly stamped; and, save only in the case of payment of double duty, as mentioned in the next section, the note, etc., shall be invalid. But it provides that no party to, or holder of any such instrument shall incur such penalty, if "at the time it came into his hands, it had affixed to it stamps to the amount of the duty apparently payable on it, and he had no knowledge that they were not affixed at the proper time, and by the proper party, and he pays the double duty as soon as he acquires such knowledge, as in the next section provided." The 13th section enacts that "any holder" of such instrument may pay double duty by affixing thereto stamps of double amount by which the stamps affixed fall short of the proper duty; and that where, in any suit, the validity of any such instrument is questioned by reason of the proper duty not having been paid, or not paid by the proper party, or at the proper time, etc., and it appears that the holder thereof, when he became such holder, had no knowledge of such defects, such instrument shall be held legal and valid, if it shall appear that the holder thereof paid double duty as soon as he acquired such knowledge.

I think the "holder" mentioned in this section must be a person who receives the note or bill, apparently duly stamped, and who does not discover the defect till afterwards—one who may be called an innocent holder—and that it cannot apply to a person who receives a bill, unstamped in fact, with instructions to stamp it, and send it forward for acceptance, and who attempts to stamp it, but does it insufficiently. How, under these circumstances, can the plaintiffs say they had no know-

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ledge of the defect till the trial? They had the knowledge by the circumstances under which they received the bill, and at the time it came into their hands. But further, if there is any doubt about the construction of the 13th section, I think it is removed by the 25th section which applies particularly to banks. [His Honor read the section.] The plaintiffs received and became the holders of the bill of exchange in question, entirely unstamped, of which they were advised, and therefore necessarily "knowing the same not to be duly stamped," and they did not, as the Act requires, "immediately on receiving or becoming the holder" thereof, "affix thereto and cancel the proper stamps;" therefore they are precluded by the 25th section of the Act from recovering on the bill.

Then, can they recover on the common counts? By the express words of the section, a bank receiving a bill of exchange under the circumstances therein mentioned, and not immediately stamping and cancelling it, shall not "make it available for any purpose whatever." The cases of *Jardine v. Payne*¹ and *Jones v. Ryder*² were decisions under the English Stamp Act 31 Geo. 3, c. 25, sec. 19, which enacts that "no promissory note shall be pleaded or given in evidence in any Court, or admitted in any Court to be good, useful or available in law or equity, unless the same be duly stamped." The words of the 25th section of the Dominion Stamp Act are quite as comprehensive; and therefore if the bill of exchange was necessary to enable the plaintiffs to recover on the account stated, they could not recover: but there was evidence in support of that count, independent of the bill.

The remaining question is, whether the defendants were liable on the charge of fraudulently obtaining money under the 136th section of the Insolvent Act. The allegation of fraud is part of the first count of the declaration on the bill, and has no reference to the common count; therefore as the plaintiffs failed to prove the special count, they did not establish the charge of fraud. That charge was, that the defendants by fraudulent representations induced the plaintiffs to take the bill of exchange and to discount it, and to pay the defendants the sum of money therein named. The charge could only be made out

¹ 1 B. & Ad. 603.

² 4 M. & W. 22.

through the bill of exchange; and, as under the 25th section of the Stamp Act, the bill not having been duly stamped, could not be made available for any purpose, it follows that this charge of fraud was not proved.

I think the plaintiffs are only entitled to recover on the common count, and that the verdict should be entered for the defendants on the first count.

KING, J. I cannot altogether agree with my learned brethren. The defendants wrote to the acting manager of the plaintiffs at St. John the following letter:

"July 17th, 1879.

E. H. Taylor, Agent Bank of N. S. Enclosed please find B. of Ex. on P. Sutherland, Jr., & Co., for £400, 90 days as against shipment per *Nina* which, if agreeable, please place to our credit at best rate possible.

Yours truly,

CUSHING & CLARKE.

Please put on necessary stamps and deduct from proceeds."

The bill enclosed was in their own favor and indorsed by them and was in three parts, and to the first of the bill of exchange was attached a bill of lading of cargo per *Nina*. The declaration was on this bill of exchange, and following this count, and as if a part of it, there was a charge of fraud under section 136 of the Insolvent Act of 1875, in the following terms: "and the plaintiffs say that the defendants did when they indorsed and delivered the said bill of exchange, and with intent to defraud plaintiffs, falsely and fraudulently represented to plaintiffs that they had the right to draw the said bill of exchange in manner and form upon the said Peter Sutherland & Co., against the cargo of the *Nina*, with the intent to induce the plaintiffs to take the said bill of exchange and to discount the same, and to advance and pay to the defendants the said sum of money named therein, and thereby and by such false pretence they the defendants did, in fact, induce plaintiffs to discount the said bill of exchange, and to pay and advance to said defendants a large sum of money, to-wit \$2000, and obtained a term of credit therefor, they, the defendants, well knowing, etc.: and said defendants have not paid said sum of money so advanced and paid by plaintiffs for and upon said bill of exchange, but the same remains wholly due and unpaid." Then followed the common money counts.

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At the close of the case the jury were directed that the charge of fraud was not proved, and a verdict for \$2143.64 was taken by plaintiffs by consent, subject to leave reserved to the defendants to move for a nonsuit or to enter a verdict for defendants.

The first of the bill of exchange was offered in evidence and objected to, on the ground that it was not properly stamped. It had a 20 cent stamp on it, but the stamp was not cancelled. It was subsequently double stamped by the addition of stamps to the amount, in the whole, of \$1.20 and admitted in evidence.

Taylor, the acting manager at the time of the transaction, says :—

“I did not myself fix stamps to this. The stamping of the bills is not part of my duties * * * At the time I negotiated the bill I did not know that the bill was insufficiently stamped or that the stamps were not properly erased. I did not know that there had been an omission to erase the stamps. I had no knowledge whatever of any informality in stamping either as to amount or cancellation. I was not aware of it until I heard of it this morning. When the bill was negotiated I placed funds to the credit of Cushing & Clarke, which C. and C. subsequently drew against.”

Mr. Morris Robinson, the manager, also testified that he was not aware that the stamps were not properly on the bill of exchange nor properly cancelled, until it appeared on the trial.

It does not clearly appear who affixed the stamps but it may be assumed that it was one of the clerks in the bank. The bank officials were authorized to deduct the amount of the stamps from the proceeds which, upon the discounting of the bill, would be in their hands to the credit of the defendants, and there is not even a suggestion of any actual intention to evade the Act. But it is said that the bank must be fixed with a knowledge of the defect at the time the bill was discounted; first, because the letter to Taylor showed on its face that the bill was then unstamped, and secondly, because the omission to cancel the stamps was the omission of some one in the bank. As to the first point, it seems to me that until the plaintiffs decided to take it as a bill for discount there was no liability of any one in respect of the instrument, and it was of no more force as a security than if it had never left the hands of the drawer. In order to make it a bill of exchange it required that some one besides the drawer of it

should agree to become a party to it by taking it or accepting it or in some way treating it as a security or evidence of liability. The mere knowledge of Taylor, therefore, that the paper was unstamped when defendants sent it to him is not material.

Then as to the second point, the facts seem to be that Taylor was authorized by the defendants to affix stamps as their agent, that Taylor requested a clerk in the bank to affix the stamps, and that the clerk inadvertently and without the knowledge of Taylor omitted to cancel the stamps. The bill was then placed at defendants' credit by the bank. The fact that the clerk omitted to do for the defendants what Taylor instructed him to do does not, I think, show knowledge on the part of the bank. The act of stamping the bill was not an act done as on behalf of the bank, but was an act done by a servant of the bank as for the drawer of the bill, and done before the bank became a party to the bill by receiving it as a payee or indorsee. The case might be different if the clerk who affixed the stamps was also a person who had authority to determine as to whether or not the bank would discount the bill, or if the stamps had been put on after the bank acquired an interest in it by becoming the payee or indorsee. It seems to me that the remedial provisions of the Act are intended to cover all cases of bona fide error or mistake, and that the knowledge which interferes with the application of the remedy is such a knowledge as implies an act of the mind on the part of the person who is called on to say whether or not the bill or note will be taken or held.

Then it is said that the bill was never issued by the defendants, as Taylor had no authority to discount it until it was stamped; but the stamping is no part of the bill in a legal sense, and therefore the authority to stamp was collateral to the offer of the bill as a security. The case, so far as regards this point, is the same as if they had directed their clerk to stamp the bill and forward it to the plaintiffs. Then as to the time that elapsed between the acquiring actual knowledge of the defect and the affixing of the double stamps: the first witness called and sworn was Mr. Morris Robinson, the manager of the bank. He soon stood aside and Mr. Taylor, the acting manager was called. During his examination the bill was proved and

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was offered in evidence. Objection was taken by defendants to the bill as not being properly stamped. The plaintiffs then gave evidence by Mr. Taylor of his want of knowledge of the defect, and proposed to double stamp the bill. I stated that I thought the plaintiffs should give further evidence to negative knowledge before the bill could be received, as Mr. Taylor had ceased to be acting manager. After Mr. Taylor's testimony was concluded, leave was given to the plaintiffs to call a short witness who was desirous of leaving the city, and then Mr. Morris Robinson's testimony was resumed and took all the afternoon. He negatived knowledge of the defect in stamping. The next morning Mr. Robinson continued his testimony, and when he had finished, and when another witness had been called to disprove knowledge, the plaintiffs affixed the double stamps and offered the bill in evidence, and it was received. I am inclined to think that the plaintiffs affixed the stamps as soon as they reasonably could after acquiring the knowledge; although I had some doubts on this point at the trial.

On the other point, I agree with my learned Chief Justice and brethren. It seems to me that the fraud that is charged must appear on the face of the pleadings to be connected with, or relate to the debt that is sought to be recovered, so that after judgment it would appear from the record that the debt that is charged to have been incurred by fraud, is the same debt as that in respect of which judgment is rendered against the defendant. The several counts are to be treated as setting forth distinct causes of action, and the charge of fraud is here stated to relate to the cause of action set out in the first count, and is not in any way charged as relating to the cause of action set out in the second count.

WETMORE, J., concurred with the Chief Justice.

*Rule to enter verdict for defendants on the first count,
 and for the plaintiffs on the common count.*

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EX PARTE HACKETT.

*Canada Temperance Act—Certiorari—In what cases taken away—
Section 111—Construction of—Penalties under Sec. 110—How
recoverable.*

Held per ALLEN, C. J., DUFF and KING, JJ., (WELDON, WETMORE and PALMER, JJ., dissenting), that by section 111 of the Canada Temperance Act a *certiorari* is taken away in all cases of conviction for offences against Part II. of the Act, except where there is an excess or want of jurisdiction.

Per WETMORE and PALMER, JJ., that the *certiorari* is not taken away where the conviction is before two Justices of the Peace, but only where it is before the officers named in section 111.

2. Per ALLEN, C. J., WETMORE, DUFF, PALMER, and KING, JJ., that the convictions, &c., mentioned in section 111 related to offences against Part II. of the Act, and not to the offences created by section 110.

3. Per ALLEN, C. J., DUFF, and PALMER, JJ., that the penalties for offences under section 110 were not recoverable by summary conviction, but by action of debt.

4. Per ALLEN, C. J., DUFF, and KING, JJ., that as a *certiorari* would still lie in some cases, *e. g.* excess or want of jurisdiction, &c., the recognition of the *certiorari* in section 118 was not inconsistent with the prohibitory words of section 111.

5. Per WETMORE and PALMER, JJ., that as the *certiorari* was not taken away by section 111 where the conviction was before two Justices of the Peace, the 118th section might apply to such cases.

October 17, 1881. *Lugrin* shewed cause against an order *nisi* of His Honor, Mr. Justice Weldon, for a *certiorari* to remove a conviction of the applicant before the Police Magistrate of Fredericton for a breach of the provisions of section 100 of the Canada Temperance Act.

Rainsford argued in support of the rule.

The grounds relied on and the argument of counsel will be found sufficiently referred to in the opinions of the Judges.

Cur. adv. vult.

The following judgments were now delivered :

PALMER, J. The first question in this case is, whether, when a police magistrate within his jurisdiction has had before him a person properly charged with an offence against the second part of the Canada Temperance Act, and such person has appeared before him when sitting within his jurisdiction and has been convicted, a *certiorari* will lie to remove such conviction into this court for the purpose of quashing it for alleged improper ruling or decision on the trial? I agree that the *certiorari* lies when such magistrate has no jurisdiction over the case, which in my opinion would happen whenever the second part of the Act was not in force, for in that case there could be no offence committed against

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it, or the defendant was not charged with any offence, or if the magistrate held his court beyond his territorial jurisdiction, or summoned the defendant from a place beyond it, or the magistrate was interested. In all such cases, there could be no valid conviction at all, except the defendant appeared and defended, and an offence was proved against him, when, as the 117th section enacts, all that is necessary to support a conviction is that there should be a competent court held in a proper place, that an offence should be proved, and no greater penalty imposed than is authorized by the Act, and that it could be understood from the warrant, process, conviction or proceedings that the conviction was made for an offence against the Act committed within the jurisdiction of the magistrate. This question was decided by the unanimous opinion of all the Judges of the first division of this Court in *Ex parte Orr*,¹ holding that the writ did not lie where the magistrate had jurisdiction: whether such decision is right depends on what is the proper construction of the 111th section considered in connection with the whole Act.

The second part of the Act creates the offence for which the defendant in this case was charged, tried and convicted before the police magistrate of Fredericton; the 99th section provides for the penalty, and the following sections to and including the 109th, provide for the tribunal to try and the procedure.

Then comes the 110th section which enacts as follows:

"Any person who, either before or after the summons of any witness in any such case, tampers with such witness, or by any offer of money, or by threat or otherwise, directly or indirectly, induces or attempts to induce any such person to absent himself or herself or to swear falsely, shall be liable to a penalty of fifty dollars for each such offence."

Then comes the 111th section which enacts as follows:

"No conviction, judgment or order, in any such case, shall be removed by *certiorari* or otherwise, into any of Her Majesty's Superior Courts of Record; nor shall any appeal whatever be allowed from any such conviction, judgment or order, to any Court of General Quarter Sessions, or other Court whatever when the conviction has been made by a Stipendiary Magistrate, Recorder, Judge of the Sessions of the Peace, Sheriff, Police Magistrate, Sitting Magistrate or Commissioner of a Parish Court."

Which in my opinion makes it as clear as language can

make it, that the Legislature has declared that the *certiorari* is taken away in all cases that are meant to be included in the words *in any such case*. Observe, the same words are in the 110th section which creates a new offence not created by the second part of the Act, and the penalty for it, that is for any person tampering with the witness *in any such case*. These words can only refer to, or mean in any case, prosecuted as directed by the eleven sections being the whole of the third part of the Act that precedes the 110th section in which these words occur. There is nothing else in the Act to which they can refer, and when the same words are repeated in the 111th section I can see nothing that would authorize me to give them any other meaning. In my opinion it is quite impossible they can have the meaning contended for by the defendant's counsel, that is, to prosecutions for the offence created by the 110th section; for the taking away is confined to convictions by a part of the persons named in the 103rd section, and thereby authorized to try offences against the second part of the Act, and neither the 103rd nor 107th sections give those or any other persons power to convict for the offence created by the 110th section, such would not be an offence against the second part of the Act, but on the contrary, was wholly created by such 110th section, which is in the third part; and power to try any offence against the third part is not given by the Act at all. The 107th section directs that offences against the second part may be prosecuted as directed by the "Act respecting the duties of Justices of the Peace, out of sessions in relation to summary convictions and orders," 32 and 33 Vic., chap. 31. It follows that this would not authorize proceedings for the penalty under the 110th section, which is not an offence against the second part, and that that penalty can only be recovered by an action under 31 Vic., chap. 1, section 7, sub-section 32, and persons violating such 110th section, can never be convicted therefor either before any of the persons named in the 111th section or any other authority, from which it follows that when the Legislature by the 111th section took away the *certiorari* in case of a conviction by some of the persons named in the 103rd section, it could not have intended a conviction under the 110th section which it had not authorized such persons to

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try, and could only refer to some proceeding that it had authorized such persons to take; that is convictions for offences against the second part of the Act. But as it is said that the 118th section provides for applications to quash convictions that may come before superior courts by *certiorari*, it could not have intended that such writ should be taken away, and I think there would be great force in the argument if the 111th section had professed to take away such writ in all cases; but it does not do this. It declares that it is taken away only when the conviction is made by some of the persons named in the 103rd section, not including them all. So, notwithstanding the 111th section, if a conviction was before two justices of the peace, the power of this Court to grant the writ is not interfered with, and to such a case the provisions of the 118th section may well apply without at all interfering with the 111th section being in full force: it follows that in my opinion, the Legislature has taken away our right to issue a *certiorari* in this case, and the rule should be discharged.

But it has been suggested that by the proper construction of the 111th section, if allowed to operate, the *certiorari* would be taken away in all cases, and that the latter part of that section does not limit the taking away to when the conviction is before the persons therein mentioned; but if the section stood in the Act without the punctuation inserted by the printer, its most natural and grammatical construction would be that the *certiorari* and appeal were both to be taken away when the conviction was made as therein stated. The material words used, stripped of all surplusage are, "no conviction, &c., shall be removed, &c., into any superior court of record, nor shall any appeal lay to any general session or other court, whenever the conviction is made by the persons therein named." Surely the natural meaning of this is, that no conviction so made shall be removed by any means into either a superior court or quarter sessions in the cases covered by the section and no more. Why should the Legislature allow the removal in a case before two magistrates by appeal, and not allow it to be removed to a superior court by *certiorari*, or other means. It is true that the public statute is published with a semi-colon after court of record, and this apparently divides this part from the last part

of the section ; but this cannot be used in the construction of the Act. This punctuation is done by the printer, and is not in the roll, for if the punctuation effected the meaning we would have the printer instead of parliament making the law. Sir John Romiley, M.R., in *Barrow v. Wadkin*,¹ says : "It seems that in the original rolls of parliament words are never punctuated." One of the effects of this in the original statute is that it is often difficult to decide whether words apply to a particular branch of a section, are and to be read *distributively reddendo singula singulis*, &c., &c., or whether they govern the whole section. It does not appear that any particular rule can be laid down as to this; but as Dwaris says, "the intention must be collected from the context to which the words relate." Adopting this rule, the most that can be said is, that when the words of the section under discussion "when such conviction is made," &c., may be construed to apply to the whole or only to the latter part of the section, the appeal to the sessions or other court, and that either might be a reasonable construction if the section stood alone, but as the first would give effect to every word of that section, and also allow the 118th section to operate, that construction ought to prevail instead of the other, which would render the first clause of that section wholly inoperative, and conflict with the 118th. And if by so confining it to the latter branch, it makes it so inconsistent with another part of the Act as to render that part necessary to be expunged altogether, by adopting the extreme rule of construction, which Sir George Jessel called the rule of thumb, that is, if a later clause in a legal document is entirely inconsistent with a former clause, the last will prevail and the first fall. But by a most fundamental rule of construction, I am not at liberty to do this if it can be avoided by any possible construction. I must reconcile all the clauses in the Act, and this is easily done in this statute by not so confining it and letting the latter clause govern the whole section, and thus only take away the *certiorari* when the conviction is made by the persons named, and thus make the 111th and 118th sections harmonize and give effect to every word in the statute: *Cooper v. Slade*,² per Bramwell, Baron.

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And the Judicial Committee of the Privy Council in *Cargo ex Argos*,¹ laid down this rule of construction, "To adopt that construction which would give some effect to words rather than that which would give none." It was also laid down by the Court, in *Rex v. Berchet*² as an old rule in the interpretation of statutes that such a sense is to be made upon the whole as that no clause, section, or word shall prove superfluous, void, or inconsistent, if by any other construction they may all be made useful and pertinent. Sir J. P. Wilde, in *In re Steele*,³ said: "I hesitate to come to the conclusion that the express words of the section meant to leave the matter in the same state in which it would have stood if they had never been introduced." Lord Holt in *Harcourt v. Fox*⁴ says: "I think we would be very bold men if, when we are intrusted with the interpretation of Acts of Parliament, we were to reject any words that are sensible in the Acts." And Lord Cairns in *Green v. The Queen*,⁵ for a reason for differing from the Judges in the Court below refused absolutely to reduce to silence words of a statute and make it altogether inapplicable. May I not say that some of my learned brothers by the construction they put upon this section absolutely reduce to silence the whole of the first branch of it, and besides make it altogether inapplicable. Again, I think I may say, as the same learned Judge said in *East London Railway Company v. Whitechurch*,⁶ if that construction is adopted the consequence will be that all the words in the 111th section that precede the words, "nor shall any appeal, &c.," might be entirely removed and ought to be removed out of the statute; in that case the House of Lords held that words should not be so treated: See. 11, M. P. C. 337, and 6 C. & F. 686.

When I am asked in this case to give such a construction to the 111th section as to make it so inconsistent with the 118th as to render a great part of the plain words of the 111th section entirely nugatory, and in fact to repeal a considerable portion of that section by what Sir George Jessel in *In re Byewater*⁷ says he "sometimes calls the rule of thumb," that is, where there are two inconsistent clauses the latter shall prevail, and I can

¹L. R. 5 P. C. 134.²1 Shower 106.³L. R. 1 P. & D. 575.⁴1 Shower 506.⁵L. R. 1 Ap. Case 513.⁶L. R. 7 H. L. 81.⁷L. R. 18 C. D. 17.

construe the statute without resorting to that extreme rule, by giving the construction to the 111th section that I have indicated—that the clause in the latter part of this section governs the whole section, and thereby the whole words of the statute can have their full meaning—I think I am bound to do so. No doubt if the 111th section stood alone in the statute it might be read that the *certiorari* was to be taken away in all cases; but to this the answer is, that it is apparent by the 118th section that was not intended, and therefore I am driven to the other construction, that the latter clause governs and qualifies the whole, and it is only taken away when the conviction is made before some of the persons named in the section as this conviction was, and therefore the *certiorari* was taken away in this case.

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WELDON, J. In my view the *certiorari* in this case is not taken away; the grammatical construction of the 111th section of the Act is in my opinion to that effect.

WETMORE, J. By section 111 of the Canada Temperance Act no conviction, judgment or order in any such case shall be removed by *certiorari* or otherwise, into any of Her Majesty's superior courts of record; nor shall any appeal whatever be allowed from any such conviction, judgment or order to any court of general quarter sessions or other court whatever, when the conviction has been made by a stipendiary magistrate, recorder, judge of the sessions of the peace, sheriff, police magistrate, sitting magistrate or commissioner of a parish court.

By the 103rd section prosecutions may be had in New Brunswick before any police, stipendiary or sitting magistrate or commissioner of a parish court or before any two other justices of the peace in and for the county in which the offence was committed. So it will be observed that though a conviction is authorized in this Province before two justices of the peace, the 111th section does not attempt to interfere with the right of the subject to avail himself of a *certiorari* or any other proceeding in reference to such conviction: the 111th section does not extend to such conviction. By the 110th section any person who either before or after the summons of any witness in any such case tampers with such witness or by any offer of money, or by

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threat, or otherwise directly or indirectly induces or attempts to induce any such person to absent himself or herself or to swear falsely, shall be liable to a penalty of fifty dollars for each such offence. It is argued that "the such case" mentioned in section 111 applies only to the tampering with a witness referred to in section 110, or that it may apply to the tampering with a witness in either case, the right of *certiorari* is of too much importance to be interfered with; in fact, that unless it is expressly taken away it still exists: this is as far as the doctrine preserving the *certiorari* can be extended. Without adopting these extensive views, as a general rule, for the decision of this case, I think there is no objection to following it. By the sections of the third part of the Act previous to section 110, provision is made for punishments for violation of the second part of the Act, penalties are provided and provision is made for forfeiture of liquors in certain cases, and the person in whose name prosecution may be had are pointed out, and the persons before whom prosecution is to be had, the form of procedure is also given, and search warrants are provided for in certain cases. A variety of cases which can be designated as offences against the second part of the Act are provided for, to which I think the "in such case," in section 110 only applies and that as to such offences and the taking away of the *certiorari* the Act should be read as if the 110th section was not there. Section 111 has nothing whatever to do with the enactment as to tampering with a witness in section 110. That section provides a penalty without specifying any special mode of recovery for interfering with a witness. A witness in what case? You must have the case before you have the witness. The section very plainly points out the case by the words "in such case," the case that is actually pending in which the witness is required to give evidence to enforce the penalty of section 110,—you require to have the case pending. The witness required to give evidence in such case and a tampering with the witness, and if in such case, which can only be the case in which the witness is required to testify. It seems to me impossible to apply the words "in such case" in section 111 to a proceeding against a party for tampering with a witness. That they must apply to the "in such case" mentioned in section

110, that is the case then actually pending in which the party was required to testify and being so required has been tampered with.

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Again, it is argued that by reason of the provisions of section 118, it is evident that the right of *certiorari* has not been taken away, at all events, that such doubts exist in this respect, that the court, whose duty it is to preserve the rights of the subject so far as the law will permit, will not declare that the subject has been divested of his right of *certiorari*.

Section 118 is, "Upon any application to quash such conviction or warrant enforcing the same or other process or proceeding, or to discharge any person in custody under such warrant, whether such application is made in appeal or upon *habeas corpus* or by way of *certiorari* or otherwise." The section then follows with directions as to how the Court or Judge shall dispose of the matter. Provisions are made for sustaining the conviction by amendment, &c. We may bear in mind that a proceeding by *certiorari* is quite open under the Act, in case of conviction against the second part of the Act before two justices of the peace under section 111; and further, that by section 112, "any person who having violated any of the provisions of this Act or of any Provincial Act, which is now or may be from time to time in force in any Province respecting the issue of licenses for the sale of fermented or spirituous liquors, or of The Temperance Act of 1864, compromises, compounds or settles, or offers or attempts to compromise, compound or settle the offence with a view of preventing any complaint being made in respect thereof or if a complaint has been made with a view of getting rid of such complaint, or of stopping or having the same dismissed for want of prosecution or otherwise shall be guilty of an offence under this Act, and on conviction thereof, shall be imprisoned at hard labor in the common gaol of the county or district in which the offence was committed for any period not exceeding three months." Section 113 provides for punishment of parties to compromise. Section 114 provides for a penalty for tampering with a witness quite similar to section 110 except it refers to any such Act, that is, other Acts than the Canada Temperance Act of 1878. Section 115 points out what it shall suffice to state in describing offences and

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what facts need not be alleged, amendment of information and adjournment. Section 117 provides variance or defect of form shall not affect convictions. The first and third part of the Act became law on the passing of the Act, and the sections I have mentioned, 112th to and including 118th, in the third part, became law without any adoption of the second part of the Act. As regards these sections becoming law it mattered not whether or no the second part of the Act was adopted. Section 118 is by no means confined to offences against the second part of the Act, it extends to what is provided for in section 112 which includes a variety of other Acts as well as the Canada Temperance Act of 1878, but if it does include convictions for offences against the second part of the Act, and as to this, my mind is not free from doubt, there is a class of convictions to which it can be applied, and respecting such class, the right of *certiorari* has not been interfered with, namely: convictions before two justices of the peace. In either view I do not see anything to interfere with the full force of the 111th section being carried out, or indeed anything, in the least degree to embarrass the plain words of the section which in positive terms takes away the *certiorari* in the several cases therein mentioned where the Court deciding has jurisdiction, as already decided in *Ex parte Orr*.¹

ALLEN, C. J. One of the questions to be determined in this case is, whether the Canada Temperance Act takes away the writ of *certiorari* in all cases of convictions under it, or only in cases arising under section 110.

In order to determine this question it will be necessary to consider several sections of the Act.

The second part of the Act (section 99) prohibits the sale of intoxicating liquor, except for certain specified purposes; and the third part (section 100) imposes the penalties for selling in violation of the second part of the Act, and directs such penalties to be recovered by summary conviction. The prosecution for such penalties in this Province, is to be before any police, stipendiary, or sitting magistrate, or commissioner of a parish court, or before any two other justices of the peace for the county in which the offence is committed. (Section 103.)

The 109th section declares that when any person is convicted of any offence against the provisions of the second part of the Act, the convicting magistrate, in addition to the penalty or punishment, may order the liquor in respect to which the offence was committed, if not more than 20 gallons, to be forfeited, and the kegs, bottles, packages, &c., containing it to be destroyed.

The 110th section declares that any person who either before or after the summons of any witness in any such case, tampers with such witness, &c., or attempts to induce him to absent himself, or to swear falsely, shall be liable to a penalty of \$50. The words "in any such case," in this section, must refer to prosecutions for selling spirituous liquors contrary to the provisions of the second part of the Act, as provided for in section 99. They refer to some preceding cases, and evidently to the cases mentioned in section 109.

The 111th section declares as follows:—

"No conviction, judgment, or order in any such case shall be removed by *certiorari* or otherwise, into any of Her Majesty's Superior Courts of Record; nor shall any appeal whatever be allowed from any such conviction, judgment or order to any Court of General Quarter Sessions or other Court whatever, when the conviction has been made by a Stipendiary Magistrate, Recorder, Judge of the Sessions of the Peace, Sheriff, Police Magistrate, Sitting Magistrate, or Commissioner of a Parish Court."

It was contended that the words "in any such case," in this section referred to the cases mentioned in section 110, viz.: tampering with witnesses, and that it was only in cases of such prosecutions that the *certiorari* was taken away. I do not so construe the 111th section. I think it has no reference to the 110th, but that the words "in any such case" used in both sections relate to the same description of prosecutions; namely to prosecutions for selling liquor contrary to the provisions of section 99, in the second part of the Act.

It will be observed that the 110th section points out no mode for the recovery of the penalty imposed for tampering with a witness. It is not recoverable under the Summary Convictions Act—the provisions of which are made applicable to the Canada Temperance Act by section 107—because those provisions only apply to offences against the second part of the Act. That penalty, therefore, must be recoverable in an action

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of debt. These reasons, I think, shew that the 111th section has no reference to the 110th; and therefore, if there is nothing in any other part of the Act, which limits or controls the plain meaning of the words composing the first sentence of the 111th section, I should have no doubt that the *certiorari* was taken away in all cases of convictions for offences against the second part of the Act, and I should adhere to the construction put on that section in *Ex parte Orr*.¹

I do not think the remainder of that section, beginning with the words, "nor shall any appeal," &c., should be read in connection with the preceding part. A proceeding by *certiorari* is very different from an appeal. The former is a common law remedy for reviewing the judicial proceedings of inferior tribunals, and can only be taken away by the express words of a statute, whereas an appeal is not a matter of common right, but must be expressly given by statute. The words of this section shew that the Legislature knew this distinction, because in reference to the removal of proceedings by *certiorari* they use the "Superior Courts of Record;" but when they deal with an appeal the words are "any Court of General Quarter Sessions"—a tribunal which has no power to grant a *certiorari*, but has power to hear an appeal in the Province of Ontario by the express provisions of the Summary Convictions Act, 32 and 33 Vic., c. 31, s. 65; amended by 40 Vic., c. 27; and all the provisions of the Summary Convictions Act are made applicable to prosecutions under the second part of the Canada Temperance Act by section 107. In addition to this, the 118th section shews that an appeal is recognized as a proceeding distinct from a *certiorari*. It follows therefore, according to my view, that though the *certiorari* may be taken away, an appeal would lie where a conviction was had before two justices under the 103rd section of the Act. It is no part of my duty to enquire why the Legislature has made this distinction—whether it was intentional, or an accidental omission. It is sufficient that according to the plain words of the section, the "appeal" is not taken away where the conviction is had before two justices. In all other cases, the Legislature has declared that a person convicted of a breach of the provisions of the

second part of the Act shall have no appeal of any kind, either by *certiorari*, or by what is technically known as an appeal. I can put no other construction on the 111th section, unless I find that some other part of the Act has qualified it, and requires a different interpretation to be given to it.

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The only part of the Act which throws any doubt upon this construction of the 111th section is the 118th section, which speaks of a proceeding by way of *certiorari* to quash a conviction, and this, it has been contended shews that the Legislature did not intend to take away the *certiorari*. It certainly appears at first sight somewhat difficult to reconcile these sections; but it must be borne in mind that even express words of a statute taking away the *certiorari* are inapplicable where there is a want or excess of jurisdiction, and generally, when the application is at the suit of the prosecutor. A *certiorari* therefore might still issue in such cases, notwithstanding the prohibitory words of the 111th section.

It is our duty to give effect, if possible, to every part of the Act; and construing the 111th section subject to the exception above stated, there is no repugnancy between it and the 118th section: effect may be given to both of them, and their apparent conflict reconciled. After a careful consideration of the Act, I have come to the conclusion that it is capable of this construction.

This view of the case renders it unnecessary to consider the question raised under the 121st section of the Act.

KING, J. I am of opinion that the 111th section refers to cases of offences against the second part of the Act. I think that the words "in any such case," in the 111th section refer to the same class of cases as is referred to by the same words in the 110th section; and in the 110th section these words clearly mean all cases of offences against the second part of the Act.

The next question is as to the extent to which the 111th section goes in taking away *certiorari* in the case of convictions for offences against the second part of the Act, and this depends upon whether the clause at the end of the section is to be read as limiting the whole of the section, or as limiting only the latter branch of it, viz, that relating to appeals. I am of

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opinion that the latter is its true meaning. For first, the grammatical construction of the two clauses dealing respectively with the subject of *certiorari* and appeal is different, and the effect of this change in the structure of the two clauses is to make them independent of each other, and therefore to confine the operation of the words of limitation at the end of the section to the latter branch relating to appeals. In the next place, the first clause forms a complete sentence by itself, and the subject of the sentence, viz. "no conviction, judgment or order" has already received a qualification by the words, "in any such case," and we should not expect to find another qualification of the same subject at the end of another independent clause. If it had been intended to introduce this qualification, the two qualifying clauses should have been brought together, and the proper language would then be this: "No conviction, judgment or order made by a stipendiary magistrate, etc., in any such case;" or, "No conviction, etc., in any such case made by a stipendiary magistrate, etc." Then the qualifying words at the end of the section, "when the *conviction*, etc.," qualify the words "any such *conviction*" in the second branch of the section rather than the words "in any *such case*" in the first branch of the section. And finally on this point, the word "the" in the clause "when the conviction," etc. (as a distinguishing adjective having much the same force as the word "such" would have, if used in the same place,) points to the "conviction" last before alluded to.

In the next place, this construction of the section agrees with the course of legislation on the kindred matter of procedure under the Summary Convictions Act. The Legislature in dealing with the subject of appeals under that Act distinguished between different classes of convictions, allowing an appeal where the conviction takes place before one justice only, but not allowing an appeal where the conviction is before two justices (or other authority having the power of two justices) unless the sum adjudged exceeds ten dollars, or the imprisonment adjudged exceeds one month; while no distinction at all is made between one class of convictions and another when dealing with the restricting of the right of *certiorari*: see and compare sections 65 and 71 of the Summary Convictions Act,

32-33 Vic. c. 31. The Canada Temperance Act differs from the Summary Convictions Act in the extent to which *certiorari* is taken away and appeal allowed, but it is worth noting that in doing what the ordinary and grammatical construction of the 111th section of the Canada Temperance Act shows that the Legislature intended to do, it was pursuing the same course pursued by it in dealing with other like matters of procedure, that is to say, making a distinction in the case of appeals between different classes of convictions, but restricting the *certiorari* irrespective of any distinction in the tribunal. Then too, appeals to the quarter sessions from convictions by justices out of sessions have been long and generally deemed a proper qualification of the justice's authority in exercising a summary jurisdiction: Paley on Convictions, p. 12.

The next question arises on the 118th section, which seems to contemplate the questioning of convictions by *certiorari* on grounds other than for want of jurisdiction. The 112th, 113th and 114th sections relate to prosecutions under the Temperance Act of 1864 and under Provincial Acts, as well as to prosecutions under this Act. Then come the sections from the 115th to the 121st inclusive, and these relate to proceedings under this Act and the Temperance Act of 1864. In this way the 118th section includes in a single category proceedings under both Acts, and also applications by way of remedying or questioning defective convictions and warrants under both Acts; and at one time I thought the reference to *certiorari* in the 118th section might be interpreted as applicable to proceedings under the Temperance Act of 1864, and that so the words might have their proper operation; but on looking at that Act in the Statutes of Canada before the union, I find that the *certiorari* was taken away there in much the same way as it is taken away here. If there were a clear repugnancy between the 111th and the 118th sections, and nothing else to show which section should prevail, the greater effect should be given to the latter section, as expressive of the later intention of the Legislature, in accordance with the settled rule of construction to that effect; but I do not think that we are required to interpret the 118th section as being repugnant to the 111th. The writ of *certiorari* lies notwithstanding the 111th section

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in cases where there is a want of jurisdiction or an excess of jurisdiction, so also at the suit of the prosecutor: Paley on Convictions, pp. 429-433. The object of the 118th section is to supply a remedy for defects of form or substance, and to secure a decision on the merits in cases of prosecutions under the acts, either of 1864 or 1878, and to do so in all cases, whatever may be the way in which the conviction is brought into question, "whether on appeal, or by *habeas corpus*, or by *certiorari*, or otherwise." The enumeration of the possible modes may be only by way of greater caution, and does not have the effect of restoring the *certiorari* where it has been taken away; any more than do the words "or otherwise" show that there is some other way of bringing up the matter besides the modes specially referred to. It is as though the Legislature had said, "It may be possible that under one or other of the two acts proceedings may be brought up by way of *certiorari*; if so, then those proceedings when brought up are to be dealt with as provided herein." I would wish to guard against the interpretation of any statute by exceptional cases. There is no more frequent and no more erroneous practice, but I think that the section in question may fairly bear the meaning here attributed to it. For these reasons I think the *certiorari* should be refused.

DUFF, J., who was absent, had seen the judgment of the learned Chief Justice with which he concurred.

Rule discharged.

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Conversion of goods—Waiver of tort—Action for goods sold and delivered—Money had and received—Particulars of demand. February.

Plaintiffs and defendant negotiating about the sale of lumber, they wrote to him offering to sell at a certain price. Before the receipt of this letter, the defendant's servants, without his knowledge, shipped the merchantable part of the lumber. In answer to the letter the defendant offered to give the price asked for so much of the lumber as was merchantable, and a lesser price for the rest, which offer the plaintiffs refused. The defendant admitted that he had got returns for the lumber shipped. In an action for goods sold and delivered and also for money had and received:

Held, That an action for goods sold and delivered would not lie.

The plaintiffs' particulars claimed for a quantity of lumber at a certain price, but made no reference to either of the counts of the declaration:—

Held, Sufficient to entitle the plaintiffs to claim under the count for money had and received, as they gave the defendant substantial information of the plaintiffs' demand.

This was an action for goods sold and delivered, and for money had and received; tried before Mr. Justice Wetmore at the York Sittings in August, 1880, in which the plaintiffs were nonsuited. The grounds of the nonsuit were that there was no evidence of any contract of sale which would sustain the count for goods sold and delivered; and that the plaintiffs were not entitled to give evidence in support of the claim for money had and received, as the bill of particulars annexed to the record only set out a claim for goods sold and delivered. The particulars were as follows:—

1878-79.—120,000 superficial feet saw logs @ \$7.00	per M.
85,000 “ “ deals @ 7.00	“
30,000 4th ends @ 7.00	“

June 28th, 1881. *E. L. Wetmore* moved to set aside the nonsuit, and failing that, for a new trial. He contended that while it is a general principle that a party cannot waive a tort, it has been decided that where goods are wrongfully converted by a person who admits a right in the owner, the owner may waive the tort: *Lee v. Shore*; ¹ Roscoe's Evid. (12th ed.) p. 478; *Coles v. Bulman*.² The fact that one received goods into his possession, and held them against the owner for a sufficient length of time to dispose of them, might be a reasonable ground for presuming that he had sold them and received the proceeds: *Hunter v. Welsh*.³ But this case is much stronger; here, the defendant admitted that 59,000 superficial feet of the lumber

¹ 1 B. & C. 394.² 6 C. B. 124.³ 1 Stark. 224.

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were loaded in a schooner by the millmen, and that he had the returns for it. It is clear that an action for money had and received would lie, and the case of *Brown v. Hodgson*¹ shews that the bill of particulars was sufficiently explicit to admit evidence in support of that count. He cited *Grant v. Aiken*;² *Fisher v. Wainwright*;³ and *Sideways v. Todd*.⁴

G. F. Gregory, contra. No evidence was given of any amount of money received, and the jury could not have found on that count. In regard to recovery for goods sold and delivered, the defendant admitted the lumber had been shipped before the plaintiffs' letter was received. It was not taken under the authority of the letter. The tort could not be waived. *Coles v. Bulman* is not applicable, as in that case there was no pretence of any tort, and there was some evidence of a contract subsequent to the delivery of the goods. [PALMER, J. When the defendant admits the plaintiffs' title, and takes the goods, not intending to commit a wrong, is that not some evidence of a contract of sale?] I contend not: *McCulley v. Ward*,⁵ and *Carrick v. Atkinson*,⁶ shew that the waiving of a tort and suing as on a contract, only applies to money had and received. *Doyle v. Taylor*;⁷ *Bennett v. Francis*;⁸ *Taylor v. Plumer*;⁹ *Seymour v. Pychlau*;¹⁰ *Turner v. Cameron's Coalbrook Steam Coal Co.*;¹¹ and *Neate v. Harding*¹² were cited.

The plaintiffs are precluded from recovering on the count for money had and received as there was no claim on that count in their bill of particulars. There is no proof of receipt of proceeds. [KING, J., refers to *Powell v. Rees*.¹³]

Fraser, Att'y Gen'l, in reply.

The principle laid down in *Doyle v. Taylor* as applicable to money had and received, applies equally to goods sold and delivered. In my view, where there is no dispute as to the ownership of the property, the tort can be waived, and an action brought for goods sold and delivered. If the particulars do not mislead they are sufficient.

Cur. adv. vult.

The following judgments were now delivered:

¹⁴ Taunt. 189.
¹⁵ Bert. R. 259.
¹⁶ M. & W. 480.
¹⁷ Stark. 400.

¹⁸ All. 505.
¹⁹ All. 515.
²⁰ Bert. R. 201.
²¹ B. & P. 550.

²² M. & S. 582.
²³ B. & Al. 14.
²⁴ Exch. 932.
²⁵ Exch. 349.
²⁶ A. & E. 422.

WETMORE, J. The declaration contained counts for goods sold and delivered, and for money had and received.

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It appeared that the plaintiffs had cut a quantity of lumber which was brought to market in the spring of 1879, and that the defendant had furnished plaintiffs with some supplies. In the fall of 1878, the plaintiffs asked the defendant if he intended buying lumber in the spring, to which he replied that he was not sure, and spoke of giving \$4 per M., which price the plaintiffs declined to take. The lumber was brought to the Victoria Mills (so called.) The parties talked about sawing it; and it was agreed that the defendant was to get it sawed, provided it could be piled separate from other lumber at the mill. Subsequently the defendant told the plaintiffs he had engaged to have it sawed and piled separate at \$1.50 per M., he becoming responsible for the sawing, and to pay for it when the lumber was sold. In September, 1879, the plaintiffs wrote to the defendant as follows:—

“If you can give seven dollars per thousand right through for the deal where it lies, you can take it; if not, we will wait awhile yet, and see how the market will be.”

The defendant afterwards told plaintiffs he had received the letter; that 59 M. and some odd feet were loaded on a schooner; that the millmen loaded it; and that he “got the letter after the lumber was loaded;” and he said he would give \$7 per M. for the 59 M. merchantable, and two-thirds price for the 4th ends. The plaintiffs refused to take that price, but offered to take \$7 per M. for the merchantable lumber, and \$6 for the 4th ends, which defendant would not give. Defendant after this gave plaintiffs the mill survey of the lumber, shewing 59,681 sup. feet of merchantable lumber, and 22,747 feet of fourth ends. They afterwards met and endeavoured to settle, but neither party varied from their previous offers. The defendant admitted that he had got returns for the 59,200 feet which he had shipped.

The evidence no doubt shews that 59 M. of the plaintiffs' lumber was taken by some person: it had, however, been taken before the receipt of the plaintiffs' letter; and supposing the taking was by the defendant, it having been taken before the receipt of the letter, it was a wrongful taking for which tres-

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pass or trover might have been maintained. The subsequent meetings and negotiations were had for the purpose of effecting a settlement, but no settlement was effected. I cannot see how a contract for goods sold and delivered can be made out. The offer to sell at a certain price, and refusal to pay the proposed price cannot very well be turned into a contract for goods sold and delivered. The taking plaintiffs' lumber was a tortious act: had the deals been taken by the defendant after the receipt of the letter from the plaintiffs of 17th September, 1879, a contract to pay the price for both qualities of deals stated in the letter, might have been implied,—the plaintiffs having consented to sell to defendant, and informing him of their price, and he, after their offer, having taken the deals, or indeed any part of them: but the deals were taken, the defendant says, by the millmen before receipt of the letter, and plaintiffs subsequently refused to take any price but that named by themselves, which defendant refused to pay. *McCulley v. Ward*.¹ The changing a right of action for a tort into an action of contract extends only to an action for money had and received, citing *Hambly v. Trott*;² and per Lord Alvanley, C. J., in *Bennett v. Francis*;³ also per Tindal, C. J., in *Clark v. Gilbert*.⁴ All that can be collected from these and similar cases is this: that if goods tortiously taken be converted into money, the court will allow the plaintiff to waive the tort and bring an action in which he can recover nothing more than the money actually received. In *Coles v. Bulman*,⁵ there was some evidence for the jury in support of a count for goods sold and delivered, which I think is entirely wanting in the present case as in *McCulley v. Ward*.

Then as to money had and received. The defendant said the millmen took it (the deals), and he had got returns for it. In another part of the evidence, defendant said he had received some returns for the lumber. There was no evidence of what these expressions meant:—assuming they meant money returns, there is no amount stated. In *Carrick v. Atkinson*,⁶ held that the assignees in bankruptcy might waive a tort and bring an action for money had and received. At page 519, in the judg-

¹ 15 Allen 505.

² 1 Cowp. 371.

³ 2 B. & P. 550.

⁴ 2 Bing. N. C. 357.

⁵ 6 C. B. 134.

⁶ 5 All. 515.

ment of the Court it is said the sale of the cargo by the defendant after the bankruptcy, was a conversion for which he would be liable to the assignee in trover; and it was the especial case in which a party might waive the tort and bring an action for money had and received, and limit his right to recover by the actual proceeds of the goods tortiously converted. In *Powell v. Rees*,¹ an administrator was held liable to an action for money had and received by the intestate for coal tortiously taken from plaintiff's land, if the intestate had sold it and received the money; and this although no direct evidence was given of the actual sum received on the sale, if the jury believed the fact of the sale. The plaintiff had a verdict for the sum which the jury considered to be the value of the coal taken, deducting the expense of raising and conveying it to market, and the verdict was sustained. In *Doyle v. Taylor*,² where goods in the possession of B. in which A. had an undivided interest, had without A.'s authority been delivered by B. to C. who retained the possession of them; Held, that A. could not maintain assumpsit against B. for goods sold and delivered, nor for money had and received, to recover the value of A.'s interest in the goods, there being no proof of a sale from B. to C. *Semble*, If a sale had taken place, although without A.'s authority, he might afterwards affirm the contract and maintain assumpsit against B. for his share of the proceeds; and in such case, the produce of the sale is the criterion of the value. *Wells v. Ross*,³ was cited in *Doyle v. Taylor* to shew "That under certain circumstances a sale would be presumed, and also that the sale was for money, so as to entitle the plaintiff to recover on the money count." The issue in that case was on a plea in abatement for the non-joinder of a joint contractor: that a sale really took place was not contested: besides, there was the material fact of an express authority to sell—the goods being sent to the defendant for that very purpose—so that in that case a sale and disposal of the goods were in performance of the defendant's duty. In the present case we have negotiations going on for the purchase of the lumber; a taking away of the lumber by the defendant's millmen before receiving the plaintiffs letter stating the price; the defendant's statement that he

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¹ 7 A. & E. 426.² Bert. R. 201.³ 7 Taunt. 403.

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had returns from the lumber, and his offering to pay \$4.00 per M. for the merchantable, and two-thirds of that for the 4th ends. In *Powell v. Rees* the verdict was sustained for the sum which the jury considered to be the value of the coal, deducting the expense of raising and carrying it to market. In this case the quantity appeared by the mill survey which the defendant produced to the plaintiffs. In *Hunter v. Welsh*,¹ per Lord Ellenborough: "It is not necessary to prove that the defendant actually received the money, in order to entitle the plaintiff to recover for money had and received to his use; for if after a reasonable time has elapsed, the defendant does not account to the plaintiff, it may be presumed that he has received money for the goods."

I think there was evidence that should have been left to the jury under the count for money had and received. The defendant meant something by the expression "he had got returns for it," and the jury might have fairly concluded the defendant meant he had disposed of the lumber and got his pay for it. It may still be said, the amount the defendant received is not proved. We have the mill survey produced by the defendant, and his offer after all this to pay \$7.00 for merchantable and two-thirds for fourth ends. I think there was evidence from which the jury might have reasonably concluded the defendant received as much as these sums in the returns he got, or very likely he would not have offered to pay these sums. On the argument it was urged that the plaintiffs did not contend for this on the trial. Their counsel did claim a right to recover for goods sold and delivered, also for money had and received. I was of opinion, and so stated on the trial, that they could not recover for money had and received, because the particulars annexed to the *Nisi prius* record were for goods sold and delivered, and did not contain a charge for money had and received, though the declaration did. In this I am satisfied I was mistaken: *Brown v. Hodgson*;² *Grant v. Aiken*.³ A bill of particulars which gives substantial information of the plaintiffs' demand, and does not confine the claim to any particular count, or mislead the defendant, is sufficient to let in evidence under any count to which the same may be applicable.

¹ 11 Stark. 224.

² 4 Taunt. 189.

³ Barton 229.

See also *Fisher v. Wainwright*;¹ *Russell v. Bell*.² Perhaps I had better quote more particularly from *Brown v. Hodgson*.³

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"If a bill of particulars specifies the transaction upon which the plaintiff's claim arises, it need not specify the technical description of the right which results to the plaintiff out of that transaction.

Shepherd, Sergt., contending that inasmuch as Pen might have recovered the value of the butter against the defendant, it was competent to the plaintiff, who had paid Pen the value of the butter, to sue the defendant for the price, as money paid to his use.

Vaughan, contra, contended that the plaintiff was precluded from taking that ground, because he had made no claim for money paid in his bill of particulars, but only for goods sold. [The particulars were: 'To 17 firkins of butter, £53 6/, not saying for goods sold.]

Mansfield, C. J., said: "At the trial my attention was not called to the count for money paid, but upon this count I think the action may be sustained. * * * As to the objection taken respecting the bill of particulars,—bills of particulars are not to be construed with all the strictness of declarations: this bill of particulars has no reference to any counts, and it sufficiently expresses to the defendant that the plaintiffs claim arises on account of the butter."

Heath, J., said: "We must not drive parties to special pleaders to draw their bills of particulars."

The particulars in the present case do not refer to any particular count, but shew that the plaintiffs' claim is on account of the lumber.

But for the erroneous view I took respecting the particulars on the trial, no doubt the case would have proceeded on the claim for money had and received; and I think there was evidence of such claim that should have been submitted to the jury, and therefore the nonsuit should be set aside and a new trial granted.

KING, J. The plaintiffs and defendant had some negotiations respecting the sale to defendant of some lumber belonging to plaintiffs, and plaintiffs wrote to defendant offering the lumber at a certain price, "\$7 per thousand right through for the deal where it lies." Before the letter was received, defendant's servants without his knowledge had shipped a part of the lumber, along with other lumber belonging to defendant. The defendant upon receipt of the letter declined to give the price asked, but offered \$7 for so much of the lumber as was merchantable, and a less price for the rest, which offer was in turn refused by plaintiffs. The plaintiffs afterwards brought

¹ 11 M. & W. 480.

² 10 M. & W. 340.

³ 4 Taunt. 189.

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this action for goods sold and delivered, and for money had and received. The learned counsel for plaintiffs contended that the plaintiffs could waive the tort and sue as for goods sold and delivered. But no decided case goes this far. The cases in which it has been held that a contract may be implied from a tortious act are of several classes: First, the common cases where the wrongdoer, having sold the property and obtained the proceeds, is held liable to the owner in an action for money had and received. "Implied or constructive contracts of this nature," as stated by Mr. Cave in his edition of Addison on Contracts, p. 22, "are similar to the constructive trusts of courts of equity, and in fact are not contracts at all." Then there are cases like *Lightly v. Clouston*,¹ where a person enticing away an apprentice is held liable to the master as in contract for the value of the services rendered by the apprentice. The court there likened the services of the apprentice to the proceeds of the sale of goods that had been wrongfully acquired. There are also cases like *Rumsey v. North-Eastern Ry. Co.*,² where a person who gets the benefit of services through deception, is held liable on an implied contract to pay what they are reasonably worth. Then there are cases like *Hill v. Perrott*,³ and *Biddle v. Levy*,⁴ where one who by fraud induces another to sell goods to an irresponsible person, and then gets possession of them himself from the purchaser, is held liable to the owner of the goods in an action for goods sold and delivered. In these cases the wrongdoer is treated as an undisclosed principal of the nominal buyers. It is unnecessary to refer particularly to the cases represented by *Smith v. Hodson*⁵ as they relate specially to the rights of assignees in bankruptcy. The case nearest to the present in its facts, is *Birmingham Gas Co. v. Ratcliff*,⁶ but that case came before the court in such a way as not to call for decision on the form of action. There too the goods were alleged to have been obtained by fraud, and in course of a transaction of purchase. It may be too that a wrongdoer is restrained from alleging his fraud to an extent that does not apply in the case of a tort without fraud. In *Rumsey v. North-Eastern Ry. Co.* already referred to, Erle, C.

¹ 1 Taunt. 112.

² 14 C. B. N. S. 641.

³ 8 Taunt. 274.

⁴ 1 Stark. 20.

⁵ 4 T. R. 211.

⁶ L. R. 6 Ex. 224.

J., said that "where goods or services have been obtained by deception, the law will imply a contract to pay what is usual and reasonable." The learned counsel for plaintiffs relied on *Coles v. Bulman*,¹ but there was evidence there of an express contract. The defendant had ordered teas from Y. to be delivered by a carrier; the plaintiff, a carrier, by mistake delivered other teas of greater value; the defendant used the teas in ignorance of the mistake, and when the carrier's clerk called to get the teas back, the defendant agreed to pay the same as for the teas he had ordered of Y. The carrier, in an action as for goods sold, sought to recover the same value as the teas defendant had ordered of Y., and Maule, J., said: "Though one party may not in such case maintain goods sold and delivered, cannot both parties consent to treat it as such a contract?" And Coltman, J., said: "Though originally there was no contract of sale between the parties, there was evidence of a subsequent agreement on defendant's part that the transaction should be considered as a sale." As to the count here for money had and received I agree that *Brown v. Hodgson*² is an authority for plaintiffs on the question of the sufficiency of the particulars; and *Powell v. Rees*,³ on the proof of the receipt of the proceeds.

WELDON, DUFF and PALMER, JJ., concurred.

ALLEN, C. J., was absent.

New trial granted.

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1882.

March.

Executor—Separate actions for penalty for not proving will—Stay of action.

Where separate actions for not proving a will were brought against two executors, under the Rev. Stat., c. 136, s. 10, (Consol. Stat. cap. 52, s. 11), the proceedings in one action were stayed till after judgment in the other. (WETMORE, J., dissenting.)

This was an application to stay one of two actions brought against the defendants, the executors of Daniel Magner, deceased, for not proving his will, pursuant to the provisions of Rev. Stat. cap. 136, sec. 10. (Consol. Stat. cap. 52, s. 11).

Weldon, Q. C., supported the application. The questions are: 1st. Whether the plaintiff can bring separate actions for the

¹ 6 C. B. 184.

² 4 Taunt. 189.

³ 7 A. & E. 428.

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penalty against each of the executors and whether one of them should not be stayed until after judgment in the other. (PALMER, J., It may be you should not apply until after judgment has been obtained against one, and has been satisfied.) 2nd: Whether this is the proper mode of bringing the question before the Court. On this point I refer to *Henry v. Goldney*.¹

Rev. Stat. cap. 136, s. 10: cap. 161, s. 13: 26 Geo. III. cap. 11, s. 7: and *Brinsmead v. Harrison*,² were also referred to.

No counsel appeared on the other side.

Cur. adv. vult.

The following judgments were now delivered:

KING, J. These are separate actions brought against each of two executors of a will to recover the penalty imposed by chapter 52 section 11 of the Con. Statutes, and the defendants apply to have one of the actions stayed until the determination of the other. The first question is whether or not a separate penalty is imposed on each executor. The 11th section of the Act is as follows:—

“If any executor of the will of any deceased person, knowing of his being named and appointed as such, shall not within thirty days next after the death of the testator, cause such will to be proved and recorded in the Registrar’s office of the same county where the deceased person last dwelt, or present the said will and renounce the executorship thereof, every such executor shall (without just excuse for the delay) forfeit the sum of twenty dollars every month from and after the expiration of the said thirty days, until he shall cause Probate of such will to be made, or present the same as aforesaid; every such forfeiture may be sued for and recovered in any Court of competent jurisdiction, at the suit of any of the heirs, legatees or creditors of the testator.”

By the interpretation clauses (Con. Stat. c. 118, sub. sec. 12) the word “executor” although in the singular number is to be read as though it were “executor or executors,” unless to so read it would be inconsistent with the manifest intention of the Legislature or repugnant to the context. Such construction is not excluded here by the use of the words “any” and “every.” The expression “any executor” is appropriate enough whether the word “executor” is to be taken as denoting a single executor, or (by force of the interpretation clause) the several executors of the one will; and the expression “every such executor”

further on in the section may very well refer to the severalty of the offence rather than to the severalty of the person, as in *Partridge v. Naylor*,¹ cited in *Hardyman v. Whitaker*.² The word "each," if used, would have had a more distinctively singular meaning.

Then looking at the nature of the duty for breach of which the penalty is imposed, it seems to me that so far as regards the obligation to prove and record the will it is clearly joint. It is the duty of both executors to do this act, and the discharge of the duty by one executor relieves the other from its performance. The will can be proved but once, and can be but once recorded; and the probate by one executor enures to the benefit of the other, who may come in and be sworn and obtain letters testamentary. In respect of the alternative duty of presenting the will and renouncing executorship I have felt a difficulty, owing to the several character of the act of renunciation. Still it is only an alternative duty; and further, as the will can be but once presented and its presentation is a joint obligation, and as there can be no liability at all upon either executor by reason of a failure to present the will and renounce executorship unless there is also a breach of the joint obligation to prove and record the will (except in the one case where an executor presents and renounces within the limited time); and moreover, as any liability of either executor may be prevented from attaching at all, or its continuance restricted, by the act of one of the executors in proving and recording the will, it seems to me that the several executors must be considered as capable of being joint offenders, and therefore liable to but a single penalty. In *Barnard v. Gostling*,³ two proctors were held jointly liable to a penalty for practising in a certain matter, without having taken out certificates under an act requiring each proctor to take out a certificate before practising.

Then as to the recovery of the penalty. Separate actions were unnecessary, as the plaintiff in an action against the executors jointly could recover against both executors or against one, according to the facts proved. It would be otherwise ordinarily in an action of debt; but although an action for penalties is an action of debt, it is founded on a tort, and par-

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¹Moore, 453.²2 East, 573 note.³2 East, 509.

1882. takes of the incidents of an action of tort. *Hardyman v. MAGNER v. HUTCHINSON. THE SAME v. SULLIVAN.* *Whitaker*.¹ Hence it is (as decided in that case) that in debt for penalties judgment may be had against one defendant in an action against several, contrary to the ordinary rule in actions of debt. Hence too it would follow that if judgment were recovered against one of the executors in a separate action against him, the judgment (even without execution) might be pleaded in bar to an action against the other executor, according to the ordinary rule in actions of tort and in actions against debtors jointly but not severally liable. *King v. Hoare*,² *Brinsmead v. Harrison*,³ and on Appeal.⁴ I think therefore that one of these actions (at the election of plaintiff) should be stayed until judgment in the other. I also think that a person to whom the benefit of a penalty is given should not increase its burthen by bringing unnecessary actions. It is much like the case where several actions are oppressively brought for the purpose of trying the same question; and there the Court will interfere either by stay of proceedings or giving time to plead in all the actions but one upon terms. *Frith v. Guppy*.⁵

PALMER, J. I think the 11th section of chapter 52 Consol. Statutes only contemplates one set of penalties for all executors if more than one and is not cumulative. The whole question turns on the meaning to be given to the words "any executor" in the statute. The words are "if any executor of any will, &c., shall not within thirty days cause the will to be proved and recorded in the registrar's office, &c., every such executor shall, &c., forfeit twenty dollars, etc." Sub-sec. 12, chap. 118 enacts that "every word importing the singular number may extend to several persons or things as well as to one person or thing, etc." It follows that the words "any executor" must, when there are several named, mean them all collectively. And when the words "every such executor" occur afterwards, I think they must have the same meaning and must be read as the several persons, the executors named in the will. And in that way there can only be one set of penalties incurred, for which each and all such executors are jointly and separately liable, and if paid or satisfied by one is a satisfaction for all.

¹ 12 East. 578.² 15 M. & W. 494.³ L. R. 6 C. P. 584.⁴ L. R. 7 C. P. 547.⁵ L. R. 2 C. P. 32.

Then, can several actions be brought for the whole against each of a number of joint executors? I agree with Mr. Justice King, that such a course is unnecessary, and that an action can be brought against either separately, or all jointly, and a recovery had either way. I think it follows that whenever all the executors are guilty of the neglect it is a joint wrong and they are all jointly and separately liable therefor. And it has been suggested that if one only had knowledge a part of the time, and another for a longer, the penalties that each would be liable for would not be the same and therefore no joint action could be brought. But this presents no greater difficulty than an action for any other wrong. Take trespass, for instance, one party commits a trespass and does injury to a plaintiff's property, and then he and another do further trespass to the same property, the remedy is plain; they are both liable for the joint trespass, and only one for the separate one. So here, if the plaintiff choose he may have a remedy against all parties liable for the joint penalties, and a separate action against any person for what he alone is answerable. In this action the same penalties are claimed against both. For that purpose one action is sufficient, and two unnecessary, and therefore vexatious. One, in my opinion, ought to be stayed.

WERMORE, J. This was an action for a penalty for not proving the will of Daniel Magner. The defendant, Richard Hutchinson, and one Daniel Sullivan, were appointed executors. A separate action was commenced against each executor, and this application is to stay proceedings in one suit by reason of the two actions being pending. Consol. Stat. c. 52, sec. 11 is referred to, which enacts:

"If any executor of the will of any deceased person, knowing of his being named and appointed as such, shall not within thirty days next after the death of the testator, cause such will to be proved and recorded in the Registrar's office of the same county where the deceased person last dwelt, or present the said will and renounce the executorship thereof, every such executor shall (without just excuse for the delay) forfeit the sum of twenty dollars every month from and after the expiration of the said thirty days, until he shall cause Probate of such will to be made, or present the same as aforesaid; every such forfeiture may be sued for and recovered in any Court of competent jurisdiction, at the suit of any of the heirs, legatees or creditors of the testator."

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Section 10 of the Revised Statutes cap. 136, page 352, is quite similar, except it provides that the suit shall be in the Supreme Court. The Act 26 Geo. III, cap. 11, section 7, is very similar. It provides that every executor so neglecting his or their trust and duty in that behalf (without just excuse made for such delay) shall forfeit unto His Majesty the sum of five pounds per month, &c., &c., every forfeiture to be had and recovered by action of debt in the Inferior Court of Common Pleas in the same county, at the suit of any of the heirs, legatees, or creditors, or in the Supreme Court, by information of Her Majesty's Attorney General, for the public uses of the Province, and the support of the Government thereof. Under the old Act the writ could be an action of debt in the Inferior Court, by the the heirs, legatees, or creditors, and in the Supreme Court only by information of the Attorney General; the amount recovered in either case to be for the public uses of the Province.

Section 12 of cap. 118 Consol. Statutes, page 948, is also referred to, which enacts that every word importing the singular number may extend to several persons or things as well as to one person or thing; and importing the plural number to one person or thing as well as to several persons or things; and importing the masculine gender to females as well as males. This is identical with the provision in this particular in Rev. Statutes cap. 161, section 13, page 462. *Brinsmead v. Harrison*¹ was cited, where it was held that a judgment in an action against one of two *tort feasons* is a bar to an action against the other, for the same cause, although such judgment be unsatisfied. So held upon the authority of *King v. Hoare*,² and the decision on this point was affirmed in the Exchequer Chamber.³ In *Henry v. Goldney*,⁴ also cited, in an action against one of several joint contractors he cannot plead in abatement the pendency to another action for the same cause against another co-contractor; but he should plead in abatement the non-joinder of the joint contractor; and if a second action is brought against all, the pendency of the former action against the other joint contractor may be pleaded. The description of action to be brought is not given in the Consol. Statutes cap. 52, sec. 11. The sum

¹L. R. 6 C. P. 584.²13 M. & W. 494.³15 M. & W. 494.⁴L. R. 7 C. P. 547.

however to be recovered is fixed and certain, \$20 a month from thirty days after the death of the testator, and under 26 Geo. III., cap. 11, section 7, the action to be brought by the heirs, legatees, or creditors is an action of debt and is to be brought in the Inferior Court of Common Pleas in the same County (which I suppose means the County of the testator's residence). Inferior Courts of Common Pleas are abolished by 30 Vic., cap. 10, (Acts 1867, page 36). The remedy however can be enforced in any Court of competent jurisdiction. If the action of debt as established by 26 Geo. III. remains, (and it is worthy of observation the Acts passed since in regard to this matter have been revisions or codifications of former laws and not any substitution of new laws) and if the liability of the executors is only a joint one, the proper way of taking advantage of the non-joinder would be by plea in abatement as in *Henry v. Goldney*, before mentioned. This I think is the proper way to test the matter—if the defendant has sufficient confidence in the position. It rather appears to me there is a separate claim against each executor whatever the form of remedy may be. The section is: "If any executor shall not within thirty days after the testator's death cause the will to be proved, &c., every such executor, &c." The chapter of terms enacts that the singular number *may* extend to several persons. Though it may do so, it must not necessarily do so,—and where a clear remedy is given to secure a separate forfeit against each of the two parties it cannot extend to such a case and limit the separate penalty against each to a single joint penalty against both. But suppose the action must be in tort, and only the one \$20 a month can be recovered, and not \$20 against each executor—why should the proceedings be stayed? Though only one sum may be recoverable, why has the plaintiff not the right to proceed separately against both? He may recover exactly the same sum against each: if so, after the judgment the proceedings might be stayed on payment of the penalty in one, and the costs in both. But suppose one of the executors should be mulcted in a \$20 penalty for the whole period from thirty days after the testator's death, he not furnishing just excuse for the delay, and the other executor did furnish just excuse for all the delay but one month—and the staying proceedings

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should protect the party in default for the long period, or the party against whom the action is allowed to proceed is unable to pay any penalty or damages, and a perfectly good party allowed to escape. *Brinsmead v. Harrison* prevents a separate action for one wrong committed by several parties after judgment recovered against one of them. In the present case there is no joint wrong; each commits a separate wrong; one may be entitled to forfeit a large sum; another a very small one, and the 11th section of the Consol. Statutes says each executor shall be liable for the forfeit of \$20 a month, where just cause for the delay is not shewn. In any view of the case I do not see how or why these proceedings should be stayed.

WELDON, J. I agree with the majority of the Court that the separate action against each of the executors for the penalty is vexatious, and one should be stayed.

ALLEN, C. J., and DUFF, J., took no part.

Judgment accordingly.

1882.
 February

DICKIE v. THE WESTERN ASSURANCE COMPANY.
Marine Insurance—Loss or damage—Limitation of time within which to bring action for recovery of—Condition—Pleading.

A policy of marine insurance provided that all losses and damages which should happen, should be adjusted and paid in sixty days after proof of loss and adjustment; and that no suit or action against the company for the recovery of any claim under the policy should be sustainable unless such suit or action be commenced within twelve months next after any loss or damage occurred. In an action on the policy, the defendants pleaded that the loss or damage to the vessel did not occur within twelve months before the commencement of the action. Replication—that the loss, without the plaintiff's fault, was not adjusted till a certain day, and that the action was brought within twelve months thereafter.

Held—on demurrer—that the plea stated a good defence, and that the replication was no answer to it.

This was an action commenced against the Western Assurance Company to recover the amount of a policy issued by them on the bark "*Charley*," lost on the voyage from Cochin to New York.

The policy contained among others, the following conditions:

"That all losses and damages which shall happen, shall be adjusted in accordance with English practice and the usage at Lloyd's, and shall be paid in sixty days after proof of loss and adjustment, and proof of interest in the assured."

"That no suit or action against the company for the recovery of

any claim upon, under or by virtue of this policy shall be sustainable in any court of law or chancery, unless such suit or action shall be commenced within the term of twelve months next after any loss or damage shall occur; and in case any such suit or action shall be commenced against the company after the expiration of twelve months next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced."

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The declaration after setting out the policy, and alleging the loss of the vessel by the perils of the sea so assured against, continued: "And all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the said plaintiff to be paid the said sum of three thousand dollars by the said defendant company, yet the said company have not paid the same or any part thereof to the said plaintiff."

The defendants, among other pleas, pleaded the following: "And for a third plea as to the said first count of the declaration, the said defendant company says that the said loss or damage to the said bark '*Charley*' and premises in that count mentioned did not, nor did any part thereof occur, nor was the same or any part thereof sustained within twelve months next before the commencement of this action."

To this plea the plaintiff replied that the loss and damage mentioned were, without the plaintiff's fault or neglect, not adjusted till the 2nd April, 1880; that proof of the loss and adjustment was given on the 29th April; that by the true intent and meaning of the policy the loss or damage occurred on the said 2nd April, when the same was so adjusted; and that the action was commenced within twelve months from the said 2nd April.

The defendants demurred to the replication on the grounds: 1st. That the facts set forth were no answer to the third plea. 2nd. That it was a departure from the declaration.

February 9th, 1882. *C. A. Palmer* in support of the demurrer, contended that the replication set up other allegations than those contained in the declaration, and attempted to import into the policy a condition which did not exist. He referred to *Bell v. Moffutt*; ¹ *Ketchum v. Protection Insurance Co.*, ² and *Johnson v. Humboldt Fire Insurance Co.* ³

¹ 2 P. & B. 151.² 1 Allen 136.³ 33 Am. R. 47.

1882. *Barker, Q. C.*, contra. There is no departure here even if the condition in the policy is a condition precedent. *Ketchum v. Protection Insurance Co.*, page 182. The declaration alleges in a general way that all conditions have been performed, and the replication simply avers a particular date. No new ground is set up. The whole point is, that the loss must count from time of adjustment. The amount is clearly not due under the contract until sixty days have elapsed, and consequently, if the twelve months begin to run from date of actual loss, there are only ten months in which to bring the action. The words "within twelve months" must certainly imply a right of action during the whole of that time. In *Ketchum v. Protection Ins. Co.*, the words are "after cause of action accrues," and my contention is that the words in this policy should be similarly construed. The "loss" occurs to the claimant at the time of the destruction of the vessel, but the loss does not become a loss to the company until the adjustment. *Mayor and Commonalty of New York v. Hamilton Fire Insurance Co.*¹ In reply to *Johnson v. Humboldt Insurance Co.*, he cited *Hay v. Star Fire Insurance Co.*²

Palmer, in reply. The case of *Hay v. Star Fire Insurance Co.* was an action to reform the policy.

Cur. adv. vult.

The judgment of the Court was now delivered by

ALLEN, C. J. This is an action on a policy of insurance on a vessel. The policy contains the following clauses: "All losses and damages which shall happen shall be adjusted * * * and shall be paid in sixty days after proof of loss and adjustment and proof of interest in the said assured."

"It is hereby expressly provided that no suit or action against said company for the recovery of any claim upon, under or by virtue of this policy, shall be sustainable in any court of Law or Chancery, unless such suit or action shall be commenced within the term of twelve months next after any loss or damage shall occur; and in case any such suit or action be commenced against said company after the expiration of twelve months next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed as conclusive evidence

¹10 Bosworth 547, and 39 New York 45.

²33 Am. R. 607.

against the validity of the claim thereby so attempted to be enforced."

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The defendants pleaded that the loss or damage to the vessel did not occur within twelve months next before the commencement of this action. Replication—That the loss and damage mentioned were, without the plaintiff's fault or neglect, not adjusted till the 2nd April, 1880; that proof of the loss and adjustment were given on the 29th April; that by the true intent and meaning of the policy, the loss or damage occurred on the said 2nd April, when the same was so adjusted; and that the action was commenced within twelve months from the said 2nd April.

The defendants demurred to this replication; and the question to be determined is the construction which should be given to the clause of the policy requiring an action to be commenced within twelve months.

The language of this clause is free from ambiguity, and admits of but one construction. The question is, when did the loss occur? The obvious answer is, when the vessel was wrecked, and—in the language of the declaration—wholly lost by the perils insured against. To adopt the language of the Court in *Johnson v. Humboldt Insurance Co.*,¹ "We are wholly unable to conceive that language could have been used that could have rendered the meaning plainer."

It was contended, however, that this clause of the policy should be read in connection with the previous clause, which provides that losses shall be paid in sixty days after proof of loss, and adjustment; and, that construing these clauses together, so as to give effect to both, the words "loss or damage" meant, loss or damage, as adjusted: in other words—that the intention of the parties was, that the limitation of the right to sue was not twelve months after the loss *occurred*, but, twelve months after the cause of action *accrued*. To adopt this view, would be to make a new contract for the parties entirely different from that which they have made for themselves.

These two clauses in the policy do not necessarily conflict. It would be quite possible, and there would be no difficulty, in

¹ 33 Amer. R. 49.

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many cases, in the insured being able to bring his action within twelve months after the loss; but if it should unfortunately happen (as it has happened here) that from his inability to furnish his proofs (though without any fault on his part), his cause of action did not accrue till after the expiration of twelve months from the happening of the loss, all that could be said would be that such was the contract he had entered into, and the Court could not relieve him from the consequences of it. There is nothing illegal, nor contrary to public policy, in parties entering into such an arrangement, and therefore it is the duty of the Court to give effect to the agreement the parties have made: *Scott v. Avery*.¹

Conditions of this kind are very common in policies in the United States, and have been held binding. *Phill. Ins.*, sect. 1983. So in Ontario. *Penley v. Beacon Assurance Co.*² In *Hickey v. The Anchor Ins. Co.*³ a clause similar to the one now in question was held to be good, and a plea that the action was not commenced within the limited time, to be a bar to the action. The same point was decided in *Davis v. The Canada Farmers' Mutual Ins. Co.*⁴ There, as in the present case, it was contended that it was sufficient if the action was brought within a year from the adjustment of the loss, but it was held that the condition that the action should be brought within twelve months after the loss or damage, was a reasonable condition, and one which the Court was bound to respect. The same principle was upheld in this Court in the case of *Ketchum v. The Protection Insurance Co.*,⁵ in which one of the conditions of the policy provided that no suit should be sustainable against the Company unless it was commenced within twelve months after the cause of action accrued. It was argued that the condition was against the policy of the law, and not binding; but Chipman, C. J., delivering the judgment of the Court, said (page 187): "We think it a wise and provident precaution to take—such as the assurers are legally justified in—to limit, in the terms of their policies, the time within which actions shall be brought, as a necessary protection to themselves against fraud; and they have as much right

¹ 5 H. L. C. 811.
² 27 Grant, 130.
³ 18 U. C. Q. B. 433.

⁴ 39 U. C. Q. B. 452.
⁵ 1 Allen 126.

to make such a stipulation as the terms upon which only they will take the risk, as they have to introduce any other condition; for the contract is voluntary, and they have a clear right to stipulate their own terms."

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The fact that the condition in that case was, that the action should be commenced within twelve months after the cause of action accrued, and not within that period after the happening of the loss, though more favorable to the assured than the condition in the policy in this case, does not alter the principle which should govern the construction of the condition in this policy, viz, that the defendants had a right to stipulate the terms on which they would take the risk.

We therefore think the plea sets up a good defence to the action, and that the replication states no legal answer to it.

Judgment for the defendants.

GUEGAIN v. LANGIS.

1882.

Estoppel—Words "warrant and defend"—Effect of in Deed.

March.

D. while residing on Crown land and after he had applied for a grant under the Labor Act, conveyed it by a warranty deed to S., who afterwards conveyed to the defendant. D., after obtaining the grant, conveyed the land in question to B., who conveyed to the plaintiff. It appeared on the trial that both B. and the plaintiff had notice of the deed to S. before the deeds were given to them respectively.

Held, That D. was estopped from denying that he had title to the land when he made the conveyance to S., and that the plaintiff, claiming under him as his assignee was bound by the same estoppel, which runs with the land.

Held, also, that the words "warrant and defend" are words creating a covenant of warranty.

Trespass *quare clausum fregit*, tried before Allen, C. J., at the Kent Circuit in March, A. D. 1881, when a verdict was found for the plaintiff, with leave reserved to the defendant to move to enter a nonsuit, or verdict in his favor.

The facts material to be stated are as follows: The land in dispute was granted by the Crown to Joseph Dupres in Sept. 1879. He conveyed to Fidele Babineau in January 1880, and Babineau conveyed to the plaintiff's wife in April following. Both these deeds were registered.

The defendant claimed to hold possession of the land under a deed from Joseph Dupres (the Crown grantee) and his wife

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to Artemise Saindon, dated the 6th March 1879, and registered the 11th of the same month.

This deed was, in form, a deed of bargain and sale, and contained the following clause:—"To Have and to Hold the said lot, piece and parcel of land, etc., hereby conveyed or intended so to be to the aforesaid Artemise Saindon, her heirs, administrators and assigns to the sole and only proper use and behoof of the said Artemise Saindon, her heirs, etc., forever: the peaceable possession whereof unto her the said Artemise Saindon, her heirs and assigns from all persons lawfully claiming we will warrant and defend."

At the time this deed was given, Dupres was living on the land, having applied to the Government for it under the Labor Act. It was proved that both Babineau and the Plaintiff had notice of the deed to Artemise Saindon before the deeds were given to them respectively.

October 19, 1881. *Landry*, pursuant to leave reserved, moved to enter a nonsuit, or a verdict for the defendant.

1st. The plaintiff having obtained the deed by fraud with full knowledge of the prior deed is estopped. See *Doe v. Oliver*¹ (Duchess of Kingston's case).

2. Dupres having given a warranty deed and having obtained the grant subsequently, he is estopped from denying his title when the deed was given, and the grant feeds the estoppel: *Doe dem. Kerr v. Wetmore*.² All Dupres' privies are also estopped, and especially if they have notice: *Crocker v. Pierce*;³ *Doe dem. Hubbard v. Power*;⁴ 3 Wash. Real Property, 4 ed., 94, 101, 110: *Bott v. Smith*.⁵ [ALLEN, C. J. Do I understand you to say that Dupres and Babineau were in the same position as if the grant had been issued at the time the deed was given to the defendant?] Under the circumstances I do.

D. L. Hanington, contra. The argument of the plaintiff's counsel would be applicable in a Court of Equity, but not here. When Dupres gave the deed in March, 1879, the title was in the Crown. It was subsequently granted to Dupres, and passed from him by a deed given for a valuable consideration. I admit that Dupres and his heirs would be estopped, but not

¹ 2 Sm. L. C. 706, 717, 718.

² 3 Allen 140.

³ 31 Maine Rep. 177.

⁴ 1 Allen 271.

⁵ 21 Beav. 511.

his assigns. *Doe dem. Hubbard v. Power* only shows that the party himself would be estopped, but the estoppel does not apply except as to the parties to the deed or persons claiming under the deed. The notice to us is of no effect in law. We have the legal title: *Parks v. Ingraham*;¹ and notice cannot affect it. The warranty does not go far enough to justify the Court in upholding the defendant's claim: *Coke 265 a*. Miss Saindon could not sue Babineau on the covenant, consequently he would not be estopped as against her. See 3 Wash. Real Prop. 111, 112.

Notice to the husband is not sufficient.

Landry in reply.

Cur. adv. vult.

The following judgments were now delivered:

ALLEN, C. J. The land in dispute was granted by the Crown to Joseph Dupres in September, 1879. He conveyed it to Fidele Babineau in January, 1880, and Babineau conveyed it to the plaintiff's wife in April following. Both these deeds were registered.

The defendant claimed to hold possession of the land under a deed from Joseph Dupres (the Crown grantee) and his wife, to Artemise Saindon, dated the 6th March, 1879, and registered the 11th of the same month. This deed was, in form, a deed of bargain and sale, and contained the following clause:—

"To have and to hold the said lot, piece and parcel of land, etc., hereby conveyed or intended so to be, to the aforesaid Artemise Saindon, her heirs, administrators and assigns, to the sole and only proper use and behoof of the said Artemise Saindon, her heirs, etc., forever: the peaceable possession whereof unto her the said Artemise Saindon, her heirs and assigns, from all persons lawfully claiming, we will warrant and defend."

At the time this deed was given, Dupres was living on the land, having applied to the Government for it, under the Labor Act. It was proved that both Babineau and the plaintiff had notice of the deed to Artemise Saindon, before the deeds were given to them respectively. Amelie Saindon, a sister of Artemise, proved that she was living on the land and occupying it for Artemise, upwards of a month before the deed was given to the plaintiff's wife; that she told the plaintiff in March,

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1880, that her sister had bought the land from Dupres, and paid for it, and had got a deed of it; and that the plaintiff said he knew it, but that Artemise had not got the grant. The jury found that the plaintiff had this notice of the deed to Artemise.

The first question to be determined is, whether the deed from Dupres to Artemise Saindon contains a warranty; and, secondly—if so, what is the effect of it? I think the deed does contain a covenant of warranty. The usual words in deeds commonly called warranty deeds in this country, are “warrant and defend;” but the important word is “warrant:” Co. Lit. 382 *b*; Rawle on Cov. 224.

It was admitted that Dupres and his heirs would be estopped by his deed from denying that he had title when he conveyed to Artemise; but it was denied that the plaintiff, as the assignee of Dupres, would be estopped.

Questions of this kind seldom arise in England, where covenants for title in conveyances of land, have superseded the old clause of warranty; but they are very common in the United States, and have also arisen in Canada.

The doctrine of estoppel by a covenant of warranty is fully discussed in 3 Wash. Real Prop. p. 93 to 122. At page 109, the learned author says,—“The cases are numerous where courts have held that if one without any title makes a deed of land with covenant of warranty, and afterwards acquires a title to the same, it will enure to the grantee and covenantee by way of estoppel. The effect is, that the title acquired by the grantor who has conveyed with warranty enures, *eo instanti* that he gains the title, to his grantee, and vests in him.”

So far, the effect of the warranty as binding the grantor and his heirs is not disputed. Then, let us see whether the estoppel extends to the assigns of the grantor. At page 118 of the same book it is said,—“So where one conveys land with warranty, but without title, and afterwards acquires one, his first deed works an estoppel and passes an estate to the grantee the instant the grantor acquires his title, not only against the grantor and those claiming under him, but also against strangers who come in after the deed creating the estoppel. And such title would enure to the benefit of the first grantee by estoppel, to the exclusion of a second grantee to whom the grantor shall

execute a deed after having acquired a title." "The doctrine here stated, that a deed with covenant of warranty by one having no title to one who records his deed, will give to such a grantee precedence of right if the grantor subsequently acquire a title to the estate, over a purchaser who takes a deed of the same estate from the same grantor without actual notice of such prior deed, is probably too well settled to be now controverted." The cases cited in support of this doctrine, are *Somes v. Skinner*,¹ and *White v. Patten*.² And the learned author refers to later cases in different States, where the same doctrine is affirmed; and particularly to a case from Delaware, *Doe v. Dowdall*,³ where it is laid down thus:—"Where one having no title, conveys land with warranty, and after acquires title, and conveys to another, the second grantee is estopped to say the grantor was not seized at the time of the first conveyance." And where both parties claim under the same person, *they are privies in estate* and cannot as such deny the title of the grantor at the time of the first conveyance; and the estoppel, working upon the estate, binds both parties and privies." After quoting the case, the learned author adds—"It may accordingly be stated, as a general proposition, that any person claiming under one who is bound by an estoppel, is himself bound by the same estoppel."

The propriety of adopting the above rule with regard to estoppels has been questioned by one of the American editors of Smith's Leading Cases, in the note to *Doe v. Oliver*,⁴ also cited in the judgment in *Doe v. Wetmore*;⁵ but Mr. Washburn in remarking upon this, says that it is the settled rule of the American law, as generally adopted.

In Rawle on Cov. 427, it is said,—“The obligation created by estoppel not only binds the party making it, but all persons privy to him; the legal representatives of the party; those who stand in his situation by act of law, and all who take his estate by contract, stand in his stead, and are subjected to all the consequences which accrue to him. It adheres to the land, is transmitted with the estate, it becomes a muniment of title, and all who afterwards acquire the title take it subject to the

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¹ 3 Pick. 52.
² 24 Pick. 324.
³ 3 Houst. 369.

⁴ Vol. 2, p. 732.
⁵ 3 Allen 144.

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burden which the existence of this fact imposes on it." Citing *Douglas v. Scott*.¹ The law is stated in the same terms by Walworth, Ch. in *The Bank of Utica v. Mersereau*,² referring to Co. Lit. 265 a and 365 a.

I will refer now to a case decided in Upper Canada in 1837—*Doe v. McEwan*.³ The lessor of the plaintiff, Tiffany, claimed under a deed of bargain and sale from one Hazelet, dated in 1825, with covenants of title and for quiet enjoyment. At the time Hazelet gave this deed he had no title to the land, but obtained a grant of it from the Crown in 1835. The defendant also claimed under a deed from Hazelet, given shortly after the grant issued to him. The defendant's deed was registered before the deed under which Tiffany claimed. It was admitted that the defendant was a *bona fide* purchaser for value, and that he had searched the records before he purchased, having heard that Tiffany made a claim to the land. It was held that the defendant, as a privy in the estate with Hazelet, was estopped by his deed to Tiffany. Robinson, C. J., delivering judgment, said,—“The deed to Tiffany, although made by Hazelet before he had the legal estate, concluded him by estoppel, because he could not be admitted to say that he had no title when he executed the conveyance: the patent afterwards issuing, enured to confirm Tiffany's title, which would thenceforward stand on the same ground as if it had issued before Hazelet conveyed to him; and the defendant as the assignee of Hazelet was estopped from setting up a title under the patent to Hazelet in opposition to his first deed.” * * * *
“The general principle, I take it, is not denied, that where one by indenture conveys an estate to another, with a covenant that he is seized in fee, he is concluded, as also his privies in blood, or in estate, from alleging that he was not seized in contradiction of his deed.”

That case differs from the one now under consideration, only in this respect:—that there the defendant was a *bona fide* purchaser for value, without notice of the plaintiff's deed: here, there is no evidence that the plaintiff (who claims under the second deed) was a purchaser for value; and he certainly was not a *bona fide* purchaser, because he had express notice of the

¹5 Ohio 198.

²3 Barb. 567.

³5 U. C., Q. B., o. a. 598.

prior deed to Artemise Saindon, and that she had paid Dupres for the land: he therefore has no equities. The case, however, must be decided according to the strict legal rights of the parties.

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The following English authorities may also be referred to, as illustrating the doctrine of estoppel:—

In Co. Lit. 352 *a* it is said, that privies in blood, as the heir; privies in estate, as the feoffee, lessee, &c., and privies in law, comprehending those who come under by act in law or, in the *post*, shall be bound by, and take advantage of estoppels.

In *Trevivan v. Lawrence*¹ it was held that parties, and all claiming under them were bound by estoppels: "as if a man make a lease by indenture, of D. in which he hath nothing, and afterwards purchases D. in fee, and afterwards bargains and sells it to A. and his heirs, A. shall be bound by the estoppel; and that where the estoppel works on the interest on the land, it runs with the land into whose hands soever the land comes."

The law is stated in the same terms in the note to *Walton v. Waterhouse*,² and in Bac. Ab. "Leases" (O), and is fully recognized in *Webb v. Austin*,³ and *Cuthbertson v. Irving*.⁴ It was upon this principle that *White v. Patten*, and the other cases cited by Mr. Washburn in support of the doctrine that privies in estate were bound by the same estoppel as the persons under whom they claim, were decided. The cases of *Right v. Bucknell*⁵ and *Heath v. Crealock*⁶ may also be referred to, as shewing what recitals in a deed will not create an estoppel.

The case of *Doe v. Wetmore*⁷ decides nothing against the defendant's contention in this case. There was no covenant of warranty there. Again, Seelye, the grantor under whom both parties claimed, was not shewn ever to have been in possession of the land, nor had the plaintiff any notice, before he purchased, of the prior deed to the defendant—facts which, had they existed, it may fairly be inferred from the reasoning of the Chief Justice, would have produced a different result in the decision. In all these particulars, the present case is essentially different from *Doe v. Wetmore*.

The case of *Parks v. Ingraham*⁸, also relied on by the plain-

¹ 11 Salk. 276, s. c. 6 Mod. 268.

² 2 Saund. 418 a.

³ 7 M. & G. 701.

⁴ 4 H. & N. 757.

⁵ 2 B. & Ad. 278.

⁶ 1 L. R. 10 Ch. App. 22.

⁷ 3 Allen 140.

⁸ 3 P. & B. 106.

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tiff, does not appear to me to affect the question involved here. The point there was simply whether a person claiming under a registered deed, was affected by notice of a prior unregistered deed of the land. There was no question of estoppel arising out of a covenant of warranty.

As Dupres was admittedly estopped from denying that he had title to the land when he made the conveyance to Artemise Saindon, so, according to the authorities referred to, the plaintiff, claiming under Dupres, is bound by the same estoppel, which runs with the land into whose hands soever it comes.

The covenant of warranty runs with the land, and is equivalent to a covenant for quiet enjoyment.

I think the verdict should be entered for the defendant.

WETMORE, J. I agree with the able judgment of the learned Chief Justice and merely mention my views in reference to *Doe dem. Kerr v. Wetmore*¹ not affecting the present case by reason of the warranty contained in the deed from Joseph Dupres to Artemise Saindon, dated 6th March, 1879. The marginal note of the case is, "S. conveyed to the defendant by deed poll of bargain and sale land of which he had neither title nor possession, but he afterwards acquired a title which was purchased by the plaintiff at sheriff's sale without notice of the prior conveyance. Held, 1st, that the defendant had no estate by estoppel; 2nd, that the plaintiff, not claiming under or recognizing the deed to the defendant, was not estopped as a privy in estate with S. from setting up the legal estate which S. had acquired since the conveyance to the defendant."

The law as laid down in this case is fully supported in *Heath v. Crealock*,² which was followed by the M. R. in *General Finance Mortgage and Discount Company v. Liberator Permanent Building Society*, to be found in W. N. of 16th Nov. 1878 at page 203. In *Heath v. Crealock* the Ld. Ch. Cairns, at page 30, says:—

"There is no estoppel whatever in this case. The conveyances to the purchaser were innocent. They were ordinary conveyances by grant; the operative words of which as is well known would create no estoppel; and the estoppel if it arose at all, would arise by virtue of the first recital in the conveyance. The recital was in substance the ordinary one in such cases. It recited that Stephens was seized

¹ 3 Allen 140.

² L. R. 10 Ch. 22.

or otherwise well and sufficiently entitled to the property in question free from all incumbrances. If the recital had been a recital simply that Stephens was seized there might have been an estoppel, but the recital is one out of which no estoppel can arise, because it is not precise or unambiguous. It is a recital which in substance amounts to a statement that he had an estate either in law or in equity, and the fact that it states that the estate, whatever it was, was free from incumbrances creates no estoppel for the purpose of making the legal estate pass. There is therefore no estoppel operating so as to convey the legal estate to the purchasers."

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At page 31 in the L. Ch's. judgment :

"Suppose the covenant for further assurance had been in this form: 'I, Stephens, covenant that if hereafter I should acquire any further interest in this estate, whether I acquire it by fair means or by fraudulent means, I will convey it to you.' Is that a covenant which could have been enforced? I think clearly not; and yet the purchasers must contend that they are entitled to maintain such a covenant at law and to enforce it, otherwise they cannot object to the decree on this ground."

Sir G. Mellish, L. J., at page 34, referring to *Right v. Bucknell*,¹ says :

"The recital there was a recital that the person conveying was legally or equitably seized; but it was laid down by Lord Tenterden in delivering the judgment of the Court, and it is no doubt a very old rule of law, that to create an estoppel the averment in the recital must be certain and precise; and it seems impossible to say that when the recital is that the conveying party is seized or otherwise well entitled to an estate in fee simple, that means he is seized of a legal estate in fee simple, the reason being that the recital involves another alternative."

The warranty in the deed from Dupres to Artemise Saindon makes all the difference. The words of it are—"The peaceable possession whereof unto her the said Artemise Saindon, her heirs and assigns from all persons lawfully claiming I will warrant and defend." In *Doe v. Power*,² in ejectment against a mortgagor by a purchaser of the equity of redemption under a warranty deed, the defendant is estopped from shewing that he had no title.

The American cases and other authorities cited in the judgment of the Chief Justice, shew that the doctrine of estoppel operates where there were covenants of warranty.

In *Doe dem. Kerr v. Wetmore*, at page 143, Carter, C. J., in the judgment of the Court says—

¹ 2 B. & Ad. 278.

² 1 Allen 271.

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"But beyond this it would appear from the authorities referred to in the elaborate notes to which we have referred, that to create an estate by an estoppel, where the title is not in the conveying party at the time of the conveyance but comes to him after the execution of such conveyance, there must be either an actual possession in him at the time of the conveyance or the conveyance itself must be of such a nature as to imply an actual seizin in the party conveying. There is no evidence in this case of any actual possession of the land in Seelye at the time he executed the mortgage to Whidden, and it is expressly laid down in the notes above referred to, that a bargain and sale is not one of those modes of conveyance from which seizin is to be inferred; that being a conveyance which does not of itself imply possession or transfer possession, but has that effect produced by the statute of uses."

In the present case we have Dupres in actual possession, which was wanting in *Doe dem. Kerr v. Wetmore*, and also the express warranty which I think is of such a nature as to imply an actual seizin in the party conveying—from either of which an estoppel arises as stated in *Doe dem. Kerr v. Wetmore*. The plaintiff had notice of the prior deed, but I think the matter of notice does not affect the case.

DUFF, PALMER and KING, JJ., concurred.

Rule to enter verdict for defendant.

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March.

Charter-party—Damage to ship—Unavoidable delay—Refusal of charterers to load—Action by ship-owners for.

By a charter-party of December 11, 1878, it was agreed that plaintiff's vessel, then on her way to Shelburne, N. S., should proceed with all possible despatch after her arrival at Shelburne to St. John, and there load from the charterers a cargo of deals for Liverpool; and if the vessel did not arrive at Shelburne on or before 1st January, 1879, the charterers were to be at liberty to cancel the charter-party. The vessel arrived at Shelburne in December, and sailed at once for St. John. At the entrance of the Harbor of St. John she got upon the rocks, and was so badly damaged that it became necessary to put her upon the blocks for repairs. Although she was repaired with all possible despatch, she was not ready to receive her cargo until 21st April following; prior to which time—on 26th March—the charterers gave the owners notice that they would not furnish a cargo for her. The owners sued for breach of the charter-party, and on the trial defendants gave evidence, subject to objection, that freights between St. John and Liverpool were usually much higher in winter than in summer, that lumber would depreciate in value by being wintered over at St. John, and also as to the relative value of lumber during the winter and in the spring in the Liverpool market; and it was contended that the time occupied in repairing the damage was unreasonable and had entirely frustrated the object of the voyage. The Judge directed the jury that if the time occupied in getting the vessel off the rocks and

repairing her, was so long as to put an end, in a commercial sense, to the commercial speculation entered into by the ship owners and charterers, they should find for the defendants. The verdict being for the defendants, *Held*, on motion for a new trial, that this was a misdirection, there being no evidence to warrant the case being left in this way, and a new trial was ordered.

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This was an action brought by the owners of a vessel called the "*Venice*," against the charterers for a breach of the charter-party, in refusing to load her; and which was tried before Mr. Justice Duff at the St. John Circuit in August, 1880.

By the charter-party, dated 11th December 1878, the "*Venice*," then on her passage from Queenstown, Ireland, to Shelburne, N. S., was to proceed, with all possible despatch, after her arrival at Shelburne to St. John, N. B., or as near thereunto as she might safely get, and there load from the charterers, their agent or his assigns, "a full and complete cargo, etc., to consist of deals and battens, and not exceeding 5% of boards and scantling, with deal ends and palings for broken stowage only; and, being so loaded, should proceed therewith to Liverpool, Great Britain, etc." And, amongst other things, it was stipulated by the charterers that "should the vessel not arrive at Shelburne on or before 1st January, 1879, the charterers should have the privilege of cancelling the charter by giving Mr. Schofield" (the ship's husband) "notice to that effect next day, otherwise the charter to remain in full force and effect." And the act of God, the Queen's enemies, fire, and all other dangers and accidents of the seas, etc., of what nature and kind soever, during the said voyage, were mutually excepted.

The "*Venice*" arrived at Shelburne in December, 1878, and she sailed from thence to St. John, on the voyage described in the charter-party. At the entrance to the harbor of St. John she got upon the rocks; and was so badly damaged that it became necessary to put her upon the blocks for repairs. Although she was repaired with all possible despatch, she was not ready to receive her cargo until 21st April following; prior to which time, on 26th March, 1879, the charterers gave the owners notice that they would not furnish a cargo for her.

On behalf of the defendants evidence was given, subject to objection, that freights between St. John and Liverpool were usually much higher in winter than in summer; that lumber would depreciate in value by being wintered over at St. John;

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and also as to the relative value of lumber during the winter and in the spring, in the Liverpool market. And it was contended that the time occupied in repairing the damage done to the vessel was unreasonable, and had entirely frustrated the object of the charter. That it was a condition precedent that the "*Venice*" should arrive in St. John and be ready to receive her cargo, as a cargo carrying ship, within a reasonable time after the making of the said charter-party, so as to be able to perform the intended voyage; but she was not ready to receive her cargo, as a cargo carrying ship, within a reasonable time, so as to enable her to perform her intended voyage; and the non-performance of that condition precedent by the plaintiffs was an answer to the action,—according to the authority of *Jackson v. Union Marine Insurance Company*.¹

The learned Judge left it to the jury to say whether or not the time occupied in getting the vessel off the rocks and repairing her, so as to be in a condition to carry a cargo, was so long as to put an end, in a commercial sense, to the commercial speculation entered into by the ship owners and charterers, and he told them that if it was, their verdict should be for the defendants.

The jury found a verdict for the defendants.

June 24, 1881. *Weldon, Q. C.*, in support of motion for a new trial.

The defendants undertook to shew they could have sold their cargo more easily in the winter, but there was really no distinction shewn between the winter and summer trade.

[DUFF, J. McKean stated that the deals would be depreciated in value 10s. per standard. He swears there is a special advantage in shipping a winter cargo, because St. John is the only open shipping port.]

Jackson v. The Union Marine Insurance Company is relied on by the defendants, but as said in *Dahl v. Nelson*,² in that case there was a dissenting minority, and some previous authorities are not consistent with the decision.

The facts there were very peculiar, and to use the language of a distinguished Judge, "it is extremely hazardous to attempt

¹ L. R. 8 C. P. 572; S. C., Ex. Ch. L. R. 10 C. P. 125.

² 6 App. Cas. 38.

to apply the principle to other cases." See *Lowndes Ins.* 131, sec. 239; *Maclachlan Ship.* 371.

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Time was made of the essence of the contract so far as the arrival at Shelburne, but no further.

She was not to be loaded with a particular cargo, lumber being forwarded at all seasons of the year.

In *Jackson v. Union Marine Insurance Company*, on the other hand, the rails were to be carried for a definite purpose. [DUFF, J. I felt constrained to put this case to the jury in the general language of *Jackson v. Union Marine Insurance Company*.]

Counsel cited *Touteng v. Hubbard*;¹ *MacAndrew v. Chapple*;² *Ford v. Cotesworth*;³ *Tully v. Howling*;⁴ *Dimech v. Corlett*.⁵

There was no sufficient evidence that the voyage was frustrated.

Geo. G. Gilbert, contra. The jury have found the voyage was frustrated, and the Court will not disturb their finding. See per Brett, J., in *Jackson v. Union Marine Insurance Company*, p. 577.

The plaintiffs were bound to get their vessel to St. John within a reasonable time, dangers of the seas intervening or not; and if the dangers of the seas excuse them from performing the contract, it relieves us also. It is mutual.

We shewed special reasons for wanting to ship at the time, the advantage of shipping in winter, freights higher, etc.

I admit that if the accident could have been repaired within a reasonable time we would not have been discharged.

There is really no distinction between *Jackson v. Union Marine Insurance Company* and the present case. There is nothing whatever in that case to shew that the shippers knew what the rails were intended for. See pages 574, 575, 577, 578.

This vessel was nearly lost in a commercial sense. When the damage from an excepted peril is such that the vessel is either a *quasi* total loss, or is so great as to require an unreasonable length of time, having regard to the ordinary length of voyage in the trade, the charterer is discharged.

¹ 13 B. & P. 291.² L. R. 1 C. P. 643.³ L. R. 4 Q. B. 127; 5 *id.* 644.⁴ 2 Q. B. D. 182.⁵ 12 Moo. P. C. 199.

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Apply this principle to the particular trade. The ordinary time for a voyage is twenty-five days. Here the vessel was not repaired for over seventy-five days.

Plaintiffs could have insured their freight and recovered. See *Rankin v. Potter*.¹

[Counsel for plaintiffs cites *Metcalf v. Britannia Iron Works Company*.]² See *Jones v. Holm*.³

Cur. adv. vult.

The following judgments were now delivered :

DUFF, J. This is an action brought by the owners of a vessel called the "*Venice*," against the charterers for a breach of the charter-party, in refusing to load her ; and which was tried before me at the St. John Circuit in August, 1880.

By the charter-party, dated 11th December, 1878, the "*Venice*," then on her passage from Queenstown, Ireland, to Shelburne, N. S., was to proceed, with all possible despatch, after her arrival at Shelburne to St. John, N. B., or as near thereunto as she might safely get, and there load from the charterers, their agent or his assigns, "a full and complete cargo, etc.; to consist of deals and battens, and not exceeding 5% of boards and scantling, with deal ends and palings for broken stowage only; and, being so loaded, should proceed therewith to Liverpool, Great Britain, etc." And, amongst other things, it was stipulated by the charter, that "should the vessel not arrive at Shelburne on or before 1st January, 1879, the charterers should have the privilege of cancelling the charter by giving Mr. Schofield" (the ship's husband) "notice to that effect next day, otherwise the charter to remain in full force and effect." And the act of God, the Queen's enemies, fire, and all other dangers and accidents of the seas, etc., of what nature and kind soever, during the said voyage, were mutually excepted.

The "*Venice*" arrived at Shelburne in December, 1878, and she sailed from thence to St. John, on the voyage described in the charter-party. At the entrance to the harbor of St. John she got upon the rocks; and was so badly damaged that it became necessary to put her upon the blocks for repairs. Although she was repaired with all possible despatch, she was

¹L. R. 6 H. L., E. & Ir. App. 88, per Blackburn, J., 136.

²Q. B. D. 423.

³L. R. 2 Ex. 335.

not ready to receive her cargo until 21st April following; prior to which time, on 26th March, 1879, the charterers gave the owners notice that they would not furnish a cargo for her.

On behalf of the defendants evidence was given, subject to objection, that freights between St. John and Liverpool were usually much higher in winter than in summer; that lumber would depreciate in value by being wintered over at St. John; and also as to the relative value of lumber during the winter and in the spring in the Liverpool market. And it was contended that the time occupied in repairing the damage done to the vessel was unreasonable, and had entirely frustrated the object of the charter. That it was a condition precedent that the "*Venice*" should arrive in St. John and be ready to receive her cargo, as a cargo carrying ship, within a reasonable time after the making of the said charter-party, so as to be able to perform the intended voyage; but she was not ready to receive her cargo, as a cargo carrying ship, within a reasonable time, so as to enable her to perform her intended voyage; and the non-performance of that condition precedent by the plaintiffs was an answer to the action,—according to the authority of *Jackson v. The Union Marine Insurance Company*.¹

In directing the jury, although I remarked upon the circumstances which distinguished that case from the present one,—upon the facts stated in the report of it in L. R. 8 C. P. 572, that the vessel in that case had been chartered to carry a specific cargo which was wanted for a special purpose, and that time was of special importance to the charterers, who, immediately on becoming aware of the disaster to the vessel, hired another to take out the cargo; and, although I read to the jury, and commented upon the language of Bramwell, B., in L. R. 10 C. P. from page 141 to 144, I left it to them, broadly, to say whether or not the time occupied in getting the "*Venice*" off the rocks and repairing her, so as to be in a condition to carry a cargo, was so long as to put an end, in a commercial sense, to the commercial speculation entered into by the ship owners and charterers; and I told them that if it was, their verdict should be for the defendants.

Having heard the subject further discussed, and having col-

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¹L. R. 8 C. P. 572; S. C. in Ex. Ch. L. R. 10 C. P. 126.

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lated *Jackson v. The Union Marine Insurance Company* with other authorities—especially with *Maclachlan on Shipping*, 349 and 505; *Seeger v. Duthie*; ¹ *MacAndrew v. Chapple*; ² and *Tarrabochia v. Hickie*; ³ and with the still later case of *Dahl v. Nelson, Donkin & Co.*, ⁴ I am satisfied that I was wrong in leaving the case to the jury in the manner in which I did.

MacAndrew v. Chapple was a case, in principle, very like the present one. In that case, as here, the charterer relied upon the delay as an excuse for not furnishing a cargo according to the charter-party. Willes, J., says: "It seems to me to be now settled, at any rate in this Court, that a delay or deviation, which, as it has been said, goes to the whole root of the matter, deprives the charterer of the whole benefit of the contract, or entirely frustrates the object of the charterer in chartering the ship, is an answer to an action for not loading a cargo; but that loss, delay or deviation short of that, gives an action for damages, but does not defeat the charter. From the time of *Boone v. Eyre*; ⁵ *Ritchie v. Atkinson*; ⁶ and *Davidson v. Gwynne*; ⁷ this rule has been applied. In the present case the breaches resolve themselves into such a delay as can be compensated for by damages. The vessel was not engaged for any particular cargo; but the contract was merely a speculation on the rise and fall of freights, and the object of the voyage, therefore, was in no sense frustrated."

The decision in *Jackson v. The Union Marine Insurance Company* is applicable only to the case of a vessel chartered for a particular adventure or speculation, which can be assumed to have been in the view of both the parties to the charter-party when it was entered into. The language of Brett, J., in the report of that case, in L. R. 8 C. P., and the reasoning of Bramwell, B., in the Ex. Ch., L. R. 10 C. P., pp. 141, to 146, leaves no room to doubt that such was the view taken of the first question by both courts. And Lord Blackburn, in *Dahl v. Nelson, Donkin & Co.*, in approving of the decision does so entirely upon the grounds given by Bramwell, B., in the passage of his judgment to which I have referred. His Lordship admits that there are previous decisions not quite con-

¹ 8 C. B., N. S. 45.
² L. R. 1 C. P. 643.
³ 1 H. & N. 183.
⁴ 46 App. Cases 38.

⁵ 1 H. Bl. 273, Note.
⁶ 10 East 226.
⁷ 12 East 381.

sistent with *Jackson v. The Union Marine Insurance Company*; but upon the grounds and to the extent mentioned by Baron Bramwell he regards it as rightly decided. And Lord Watson at pages 61 and 62, confines his sanction of it to the case of "an agreed cargo" and what would be within the presumable intention of both the contracting parties. Whether time was of the essence of the contract or not, must depend upon the construction of the contract itself, and not upon what occurred subsequently to its being entered into. And the contract here being in writing, its construction was for the Court and not for the jury.

Now what was the cargo here? The charter was to load a full and complete cargo, to consist of deals and battens and not exceeding 5% of boards and scantling, with deal ends and palings for broken stowage. There was nothing whatever on the face of the charter-party to shew or suggest that either party, when entering into the charter-party, had in view any particular deals or battens. The terms of the charter-party would have been complied with by a cargo of any deals and battens, provided only a full and complete cargo was furnished—vide *Jones v. Holm*.¹

I think, therefore, that the principle of *Jackson v. The Union Marine Insurance Company* does not apply to this case; and that I was wrong in leaving the question to the jury in the manner in which I did. There must, therefore, be a new trial.

PALMER, J. The learned Judge left the following question to the jury: "Was the time occupied in getting the ship off the rocks and repairing her so as to be a cargo-carrying ship so long as to put an end (in a commercial sense) to the commercial speculation entered upon by the ship owner and the charterer;" and I think there was no evidence to warrant such a direction. There is always a preliminary question of law before leaving any question of fact to a jury to be passed upon by the Judge, viz., whether there is any reasonable evidence given by the party who seeks the benefit of such fact and on whom the onus of proving it lies, and in the absence of such proof the Judge must direct the jury that they cannot find the existence of such fact.

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¹L. R. 2 Exch. 385.

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The only commercial speculation entered into between the ship owner, the plaintiffs, and the charterers, the defendants, by the charter-party in question, was that the plaintiffs agreed that their ship should on arrival at Shelburne proceed to St. John and there load a cargo of deals and carry them to Liverpool, the dangers of the seas, etc., excepted; in consideration whereof the defendants agreed to provide a cargo to be loaded at St. John and pay a stipulated freight on their delivery at Liverpool.

The vessel arrived at Shelburne, sailed on her voyage to St. John and was driven on the rocks in the harbor of St. John, about the end of December, 1878, and although not totally lost was thereby so much injured that it took from that time until the 21st of April, 1879, to get her off and repair her, when she was offered to the defendants to be loaded and they refused to furnish the cargo except at a reduced freight.

The only evidence in the case that it was contended shewed that such delay had the effect of putting an end to this contract as a commercial speculation was that the freights were higher when she would reasonably have arrived under the charter and have been ready except for the accident than when she was ready to receive cargo; that the delay would make the voyage a summer one, and that freights were usually higher in winter voyages than in summer ones, because deals could not be shipped in winter from many other ports, while they could at St. John, and a ship could carry cargo on deck in summer but not in winter, and it was further shewn that the defendants intended to ship particular deals which they had in St. John by this vessel, which they had to ship before this vessel was ready; but this was not communicated to the plaintiffs before the charter was made, and the defendants were shippers of deals from St. John to Liverpool, which they shipped all the year round. I cannot see the slightest evidence in these facts that the commercial speculation of the parties could be put an end to by any necessary delay that would occur in the plaintiffs bringing their vessel to St. John, and getting her ready to receive the cargo. In order to determine whether delay would put an end to a particular speculation we must ascertain what that speculation is. If it is the furnishing

of a ship on one side and a cargo to be carried on the other, and it is apparent that anything is in that speculation, that is, contained in the contract in the charter, and nothing can be taken to be out of the contract that is covered by the words of it, except both parties contemplated, or under the circumstances known to them both ought to have contemplated it was not intended to be included, it follows that if the defendants had a particular cargo that had to be shipped by a particular time, and they communicated that fact to the plaintiffs before the charter was made, or if from the nature of the business, there was anything to show the having the kind of cargo that the defendants had themselves to deliver, could not be had after a particular time, or that the shipping of it after such time would be such an absurdity in view of the facts known to both parties, that the court could at once see that such a transaction could not have been contemplated, it may be that the defendants would not be bound to furnish it, if the vessel was not ready to receive it before that time; not because the plaintiffs have not performed their part of the contract, nor that the defendants are excused by law from performing their part, but because the defendants have not contracted to load the cargo in such a case.

The defendants ship deals on this voyage all the year round, and they were willing to furnish this cargo to load this vessel at the time she was ready, but only at a reduced freight, for freights had fallen. The plaintiffs did not even know that the defendants intended to ship any particular deals in this ship, and the ship was bound to take any fair cargo of deals. Under such circumstances how is it possible for any court to find that the plaintiffs contemplated when they entered into this charter-party, or when they incurred the expense of sailing from Shelburne to St. John, that the defendants would not load her unless she arrived in some particular time, the only contract between them being that she should arrive as soon as she reasonably could, dangers, etc., excepted? If the mere falling of the freights within the time reasonably necessary to bring her there and prepare her for the cargo, having regard to what she had to encounter to perform such a voyage, and the accidents that happened to her, without the fault of the plaintiffs, is to have that effect, every sane ship owner would bring his vessel to the point of

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loading, and then take the going freights, rather than enter into a contract to take the cargo at a stipulated rate of freight, no matter whether it was higher or lower than the going rate when she arrived.

The voyage that this ship engaged to perform began at Shelburne and not at St. John. The material part of the charter-party is as follows; "That she shall proceed with all possible dispatch after arrival at Shelburne to St. John, N. B., etc., and there load a cargo of deals, etc., and shall proceed therewith to Liverpool, G. B., at sixty shillings per standard freight (the act of God, pirates, the Queen's enemies, fire, and all other dangers and accidents of the seas, etc., always mutually excepted.)"

The defendants, in consideration of this, promised to provide the cargo to be so carried and pay the freight, and the moment the ship left Shelburne on the way to St. John she had begun the voyage under this charter, and when she arrived at St. John was made ready for cargo. She had performed part of the voyage contracted for, the payment of which, of course, depended upon whether or not she delivered any of the cargo at Liverpool, or the charterers themselves prevented her from completing her voyage. This being so, what would excuse the ship from performing the rest of the work contracted for? The rule, I think, is clear that if the contract contained no exception, the ship owner would be obliged to compensate the defendants for any damage occasioned by his not carrying the cargo, even although the vessel had been totally lost by the perils of the seas. If, as in this case, such perils were excepted, nothing less than total loss would excuse him; or unless under the peculiar circumstances of the case some exceptions were implied, which possibly might arise in cases of contract for carrying particular goods, such as green fruits or other things which could only be carried at particular times, or perhaps when the contract was made to the knowledge of both parties, with reference to particular goods, which had to be shipped in some limited time. There is no evidence that this contract was entered into under any such circumstances, the defendants were not obliged to furnish any particular deals, or that they could not be shipped at any particular time, or that the shipping of deals from St. John to Liverpool at the time she

was ready for cargo, or indeed at any other time even later, would be such an absurdity in a commercial sense, as to enable me to say that shipping deals at that time was not contemplated by the parties when they entered into this contract. If the defendants did not choose to take the risk of any delay that might be occasioned by the perils of the seas, it was easy to provide against it by a clause authorizing cancellation, if she was not ready to receive the cargo before any time that they might think desirable, or make the amount of freight depend upon the time she was ready to receive her cargo. If they had sought to introduce such terms the ship owner might not have agreed to it. This not being so introduced, I think both took the risk and agreed to perform their part of the contract, that is, the ship to proceed to St. John and load the cargo, and if any accident occurred short of the total loss of the ship on the voyage there, the plaintiffs were bound to repair her in a reasonable time, and were allowed all the time reasonably necessary for that purpose, no matter how long that might be, and if they made any unnecessary delay they were liable to the defendants for all damages occasioned thereby. On the other hand the defendants were bound to furnish the cargo as agreed. I therefore think that the question put by the learned Judge to the jury in this case is not in it. The question whether or not the ship was so injured on the voyage from Shelburne to St. John that she could not be sufficiently repaired to carry this cargo to Liverpool, I am not now called upon to decide. If, on another trial, the defendants are able to prove this, they themselves will know, and can in that way get the benefit of it; but a jury must pass on this. Physically or mechanically she could, but I do not mean that, but as a matter of business carried on by the dictates of sense, could she? Or, in other words, would a prudent owner, that is, an owner conducting himself according to the dictates of common sense in business, repair the ship? If so, in my opinion the plaintiffs were bound to do so and to load the cargo, and the defendants to furnish it, and if not the contract was at an end between them, for the performance of it was prevented by one of the exceptions contained in it. The law on the subject as expressed by Mr. Justice Brett in *Jackson v. The Union Marine Insurance*

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1882. *Company*,¹ and which was upheld in the Court of Appeal, is
SCHOFIELD laid down in the words, "That where a contract is made with
v. reference to certain anticipated circumstances, and where, with-
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or impossible of application to any such circumstances it ceases
to have any application; it cannot be applied to other circum-
stances which could not have been in contemplation of the
parties when the contract was made." If this is the rule that
such an exception can be introduced in such cases, then it
follows that the party seeking to do so must prove that the
contract was made and that the circumstances exist, which
make it impossible to apply the contract to such altered
circumstances. I have already pointed out that, so far from
this being the case, this contract was entirely applicable
to the performance of it on both sides at the time the defend-
ants refused to perform it, when the ship was made ready to
receive the cargo, and was prevented from performing the rest
of the voyage by not being able to get her cargo.

There is a stipulation in this charter-party that the defend-
ants were at liberty to cancel it if the ship did not arrive at
Shelburne by the first of January, 1879, and the defendants'
counsel contended that this showed that it was not contem-
plated that the defendants should ship a cargo unless the ship
was ready for it by some particular time; but so far from that
being the proper inference to be drawn from such a clause I
think the opposite inference might well be drawn from it, for,
if it was not contemplated that this contract was to be performed
unless the ship was at St. John ready for cargo by some par-
ticular time, there was no necessity for putting in a clause
giving the defendants the right to cancel unless she arrived at
Shelburne by the 1st of January; and the inference I draw
from their not putting it in is this, that the defendants were
not willing to take the risk of the time required for the vessel to
get to Shelburne, and the plaintiffs were willing and consented
to take that risk, and it was so provided against by putting it
in the contract, and with reference to the time required to go
from Shelburne to St. John, the defendants were willing to
take that risk, and the plaintiffs were not, and therefore nothing

was put in the contract except that the ship was to proceed with all possible speed to St. John and get ready for cargo when the defendants were to furnish it, neither party knowing how long it would take, and each taking their chance. Suppose the ship had not arrived at Shelburne until after the first of January, and the defendants insisted that the plaintiffs should perform the contract, no matter how late she arrived, the plaintiffs could not help themselves, but would have to perform it, for by the contract the defendants had the option to cancel, not the plaintiffs. This, I think, shows that it was not contemplated that any other time was to discharge either party except what was stipulated for, and in fact none other was contemplated. I therefore think there must be a new trial in this case.

WETMORE, J., concurred.

WELDON, J. The ship "*Venice*," a vessel then on her voyage from Ireland to Shelburne, Nova Scotia, was chartered by the defendants from the plaintiffs to proceed with all possible despatch, after her arrival in Shelburne, to St. John, New Brunswick, and there load a cargo of deals from the defendants at 65/ per standard. Should the vessel not arrive at Shelburne before the 1st January, 1879, the charterers to have the privilege of cancelling the charter-party by giving the plaintiffs notice to that effect the next day; otherwise the charter to remain in full force, the usual clause dangers of seas, navigation, &c. Cargo to be delivered alongside for shipping, usual custom of the port to be observed in cases not specially expressed.

The "*Venice*" proceeded to Shelburne and from thence to St. John and anchored outside of Partridge Island on the 22nd December, 1878, a gale of wind sprung up, drove the ship from her anchors and forced her on shore at Courtenay Bay in St. John harbor. She was taken off and repaired, and was ready to receive cargo on the 21st April, 1879. On the 26th March the defendants gave notice that they would not furnish a cargo, and considered the charter as cancelled. The plaintiffs had the "*Venice*" repaired as expeditiously as was practicable and the ship was ready to receive cargo on 21st April. The defendants refused to furnish a cargo, and the ship was chartered for

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1882. 52/6 per standard. The defendants had been shipping deals from January to April, and no specific deals were set apart to load the "*Venice*." The defendants contended they were excused by the great delay in repairing the "*Venice*" from furnishing a cargo and they gave notice in March to that effect. The plaintiffs claim the fulfilment of the charter-party, and that the defendants are bound to furnish the cargo: the "*Venice*" having arrived in due time at Shelburne, and off St. John harbor, but the perils of the seas caused damage which had to be repaired, and no unreasonable delay having taken place in making these repairs, the defendants are bound to furnish a cargo, and their notice in March does not excuse them so doing. The learned Judge left the case to the jury,—was the delay in repairing such as to justify the defendants refusing to furnish a cargo? The jury found for the defendants. The question is, whether it should be left to the jury.

The charter-party is one to which the court are to give a construction.

I am of opinion that the question left to the jury was immaterial. It belongs to the court to decide what was the contract—and was the voyage lost, and was the vessel repaired in a reasonable time for the cargo to meet the voyage?

The case of *Jackson v. The Union Marine Ins. Co.* was not an action on the charter-party,—that only arose incidentally, and the opinions of the Judges in that case are of great importance in enabling the court to arrive at a conclusion on this point. It is quite evident from the evidence, no blame can be attached to the owners of the "*Venice*," and the principle of Bovill, C. J., as laid down by him, must have a considerable bearing on this case. But that case was against the underwriters on the freight. The construction of the charter-party came into the case incidentally: the facts differed in many respects from the case now under consideration. The majority of the Court decided upon the liability of the insurance company for freight to be earned.

There was no engagement in the charter-party that in case the vessel arrived at Shelburne before the first of January, the defendants could cancel the same. The specified time was fixed

by the defendants to have an option in case of her non-arrival at Shelburne.

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There is no conflicting evidence and the finding of the jury was immaterial, as in the case of *Jackson v. The Union Marine Ins. Co.* That case was on the same facts as in this case: there the question was, were the underwriters liable for the freight chartered? The charter was entered into on 22nd November, 1871, and insurance was effected on the 9th December, 1871.

The facts of that case are similar to this—but the actions were, one for loss of vessel, the other for chartered freight to be earned. There it appeared "*The Spirit of the Dawn*," owned by Jackson, was on 22nd November, 1871, chartered to Rathbone & Co., to proceed with all convenient speed from Liverpool to Newport, and there ship a cargo of railway iron for San Francisco, ordinary perils excepted. The ship sailed in tow from Liverpool on the 2nd January, 1872. The ship, which was an iron one, before arriving at Newport, took the rocks at Carnarvon Bay. The plaintiff and the salvage association proceeded to extricate and save the ship, and had her taken off and brought back to Liverpool, where she was sold, and was still under repair at the time of the trial, August, 1872.

On the 16th February, 1872, Rathbone chartered without the plaintiff's consent, another ship by which they forwarded the rails to San Francisco. These rails were wanted there for the construction of a railway. Mr. Justice Brett, who tried the cause, upon this evidence, left to the jury three questions: First, was the ship a total loss? Secondly, whether the time necessary for repairs was so long as to put an end and make it unreasonable for the charterer to supply the cargo. And, thirdly, whether such time was so long as to put an end, in a commercial sense, to the commercial speculation entered upon by the ship-owner and the charterers. The jury found all three questions in the affirmative. The learned Judge says,—“I, upon the view that there was no evidence according to the figures of a constructive total loss of the ship, and no evidence of loss of freight by the perils insured against, because the ship owner had a right to repair his ship however long it might take, and insist, after its repair, on the delivery of the agreed imperishable cargo, so as to enable him to earn the

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chartered freight, directed the verdict to be entered for the defendants, reserving leave to the plaintiff to move to enter on either or both policies."

The Judges in the Court below differed. Brett and Keating, Justices, held—"In such a state of things arising under a charter-party, such as the charter-party under discussion, where no benefit of any kind has accrued to the charterers, the ship owner has lost his power of earning any part of the chartered freight." * * * "They thought the action on the policy on freight was maintainable."

Bovill, C. J., dissented on the ground that "There was no total loss either actual or constructive of the ship; the only loss of freight was that which arose from the refusal of the charterers to load the vessel, and from the plaintiff not having insisted upon their performance of the contract."

The verdict was entered for the plaintiff against the underwriters on the freight.

This case was appealed to the Exchequer Chamber and the Court there affirmed the decision of the Court below that the underwriters were liable on chartered freight. While a majority in the Common Pleas and the Exchequer Chamber of the Judges held the underwriters on freight were liable—they do not decide the charterers are not liable, for Bramwell, B., in giving his judgment says:—"The first question in this case is, whether the plaintiff could have maintained an action against the charterers for not loading; for if he could, there certainly could not have been a loss of the chartered freight by any of the perils assured against. In considering this question, the finding of the jury that 'the time necessary to get the ship off and repair her, so as to be a cargo carrying ship, was so long as to put an end, in a commercial sense, to the commercial speculation entered into by the ship owner and charterer' is all important. I do not think the question could have been left in better terms, but it may be paraphrased or amplified. I understand that the jury have found that the voyage the parties had contemplated had become impossible; that a voyage undertaken after the ship had been sufficiently repaired would have been a different voyage: not indeed as to the ports of loading and discharge, but different as a different adven-

ture." * * * The question "turns on the construction and effect of the charter. By it the vessel is to sail to Newport with all possible despatch, perils of the seas excepted. It is said this constitutes the only agreement as to time, and provided all proper despatch is used, it matters not when she arrives at Newport. I am of a different opinion. If this charter-party be read as a charter for a different voyage or adventure, then it follows there is necessarily an implied condition that the ship shall arrive in Newport in time for it." * * * "He also impliedly agrees that the ship shall arrive in time for the voyage; that is a condition precedent, as well as an agreement, and its non-performance not only gives the charterers a cause of action but also releases them."

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The Exchequer Chamber considered this a condition precedent, the non-arrival at Newport in a reasonable time, put an end to the contract, though as it arises from an excepted peril, gives no cause of action. They excuse the ship owner. The condition precedent of arrival at Newport had not been performed, and no default of the owner, and refer to *Freeman v. Taylor*.¹

Cleasby, B., in the Exchequer Chamber gives his reasons at considerable length, after reciting the facts more fully which he states thus—"By the charter-party the vessel '*Spirit of the Dawn*' was to proceed from Liverpool to Newport, and there take on board and carry to San Francisco a cargo of iron rails. The vessel sailed from Liverpool on the 2nd January, 1872, got aground on the 3rd upon the rocks in Carnarvon Bay, was got off and taken to a place of safety on the 18th February, then taken to Holyhead and afterwards to Liverpool, where she was sold by auction on the 13th June, for £5,300. The purchasers repaired her, and it was proved on the 14th August that it would take a fortnight more to complete the repairs. But, in the meantime, after the vessel got on the rocks and as soon as it was plain that some time would be required for her repairs, attempts had been made by the charterers to come to some arrangements with the plaintiff for taking up another ship to forward the rails for the construction of a railway. The plaintiff refused to release the charterers from their contract, and

¹ 18 Bing. 124.

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on the 16th February, the charterers chartered another ship by which they forwarded the rails." And he says, as to the freight which the ship owner is entitled to, the verdict is properly entered, and continues: "But this was not the principal question raised in the case argued before us. The principal question was one of great interest, because the decision upon it not only decides the case before us, but regulates the conduct of all who enter into charter-parties—a very numerous class of persons, of many nations, and who ought to have some known rule to act upon. The question is, whether under the circumstances of the present case, the plaintiff was entitled to repair the vessel (using all proper despatch in doing so) and to call upon the charterers to fulfil their charter. I agree with the opinion expressed by my brother Brett, at the trial, and adopted by Bovill, C. J., in the Court below, that the finding of the jury was immaterial, and upon such facts as the present, which are free from question, it was not for the jury to put a construction upon those facts, but for the law to determine the rights of the parties upon them. Indeed I think the law has already done so upon principle and decided cases. The settled principle is that, when an agreement or provision is made applicable to a particular subject, that provision forms the agreement on that subject." He refers to the authorities referred to fully by the late Lord Chief Justice Bovill in his judgment in the Court below, with which he fully agreed.

Chief Justice Bovill says: "In cases where the delay, inconvenience or expense of repairing the vessel would materially affect and be injurious to both parties, they would generally agree to cancel the contract; but where it is the interest of one party only to put an end to it, he must make out his right to do so before he can be justified in refusing to perform it."

In *Jones v. Holm*,¹ the plaintiff on the 29th January, 1866, made a charter-party with the defendant, that the "*Edith Marion*," then at Liverpool, should proceed to Pernambuco and there load from the defendant's factory "a full and complete cargo of cotton, in pressed packed bales, with sufficient sugar in bags as ballast," with the usual exception of fire and accidents of navigation. After part of the cargo was on board, and

¹ 2 Ex. L. R. 335.

while a portion of the residue was alongside, the vessel caught fire, and was extinguished by scuttling the vessel. The damaged cargo was sold, and that alongside forwarded by another vessel to Liverpool. This was the 24th May. The vessel was repaired with all reasonable despatch, and was on the 30th July tendered to the charterer's agent to take the remainder of the cargo. The agent refused to supply more cargo, and the vessel ultimately obtained a cargo at Macao, which she carried to England at a less freight than she would have earned for a full cargo under the charter-party. The question in the Court was, was the defendant liable for the difference?

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Bramwell, B., in delivering the judgment of the Court says, "That the plaintiff was entitled to their judgment. The first objection made by the defendant was that, in the circumstances under which the delay caused by the accident occurred, the voyage became a different voyage; that the original voyage was frustrated, and the case therefore came within the rule which, in the case of such frustration, excuses the charterer from loading. I do not think that the facts stated have that effect. Nothing was said that the two months lost made the voyage a different voyage from that agreed for. Neither do I think that the master, forwarding the remaining bales by another vessel, shews any intention of treating the charter at an end.

It was objected that the obligation was to carry and deliver a cargo, that that became impossible when the part first loaded was burned. It was admitted the defendant was not bound to load over again the quantity destroyed; the charter has not been fulfilled in substance nor in words; he shews no justification for not having done so, and the plaintiff is entitled to judgment."

This case clearly shews the charterer was not exonerated by the delay. The cargo was such a one as the delay could not put an end to as a commercial speculation; it was not a cargo of fruit at a time of the year when there was no fruit, nor a cargo of ice, as Bramwell, B., says in the *Jackson* case: "Suppose a charter to fetch a cargo of ice from Norway entered into at such a time that a vessel would reach its destination with reasonable despatch in February when there was ice and bring it back in June when ice was wanted, and by perils of the seas it could

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not get to Norway till the ice melted, nor return till the ice was of no value, can it be that the charterer was bound to load, that he had agreed in those events to do so?" From these observations of Mr. Baron Bramwell, the consideration does destroy a commercial speculation, in such case delay might alter the situation of the charterer. Baron Cleasby says: "In all arguments founded upon convenience, we were pressed by extreme cases, and it was asked how long a man was to keep a cargo, perhaps a perishable one. Was he to keep it for a year? The answer is, if the cargo is of such a nature, or an early shipment of vital importance, the charterer should have a special clause in the contract; but if he does not, still the contract is not one upon which there can be a claim for a specific performance. As soon as it is plain that the delay will really be serious as regards the condition of the intended cargo or the purpose for which it was destined, the charterer should forward his cargo by another vessel. He does not by so doing break his contract because he may provide another cargo. If he does do so, he should give notice at the earliest period to the shipowner. He will be liable in damages no doubt, but not to the freight, and the amount will depend upon the state of freights."

In *Hurst v. Usborne*¹ there had been a detention of one hundred and fifty-two days, being perils of the seas, and the charterer refused to load, partly on the ground that the vessel had arrived after the time when the export trade usually took place from the port of loading. Mr. Justice Willes, in giving judgment said—"As to the other question, whether the construction of the charter-party can be affected by the fact that the particular description of cargo could only be supplied at a certain season of the year; the answer to that I apprehend is, that the charter-party was probably entered into in the hope that the vessel would arrive at Limerick at that time of the year. But the question is, who takes the risk whether she would or not? Why the person who ships the goods takes the risk, unless he stipulates the other party shall take it. Here it is not stipulated that the vessel shall arrive at Limerick by any particular day, but only that she shall proceed there with all convenient speed. The owner has performed his contract to

proceed with all convenient speed when he has done all he could, but has been prevented by dangers of the seas."

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So in the present case, the plaintiffs have done all they could. The vessel arrived at Shelburne, and was sent to St. John before the 1st of Jan'y, 1879. A gale drove her into Courtenay Bay. She was got off and repaired with all practicable and reasonable speed, ready to receive a cargo in April, and they did all that the law required them to do.

The observations of Lord Chelmsford, in the case of *Rankin v. Potter*,¹ in relation to the right of the ship owner, under the charter, where there has been damages requiring reparation, are:—"If the sea damage which the ship sustained in New Zealand was such as to reduce her to a state which rendered her utterly incapable of performing the voyage to England without an expense which no prudent uninsured owner would incur, then the freight was totally lost from that moment, and how the owners chose to deal with the disabled ship afterwards was wholly immaterial. If the damage of the ship had been such that it might have been repaired at a reasonable expense, and put in a condition to earn the freight, and the ship-owners had declined to take this course, they would have lost the freight, not by the perils of the sea, but by their election."

The rule given is a very simple one,—repair the damage, if that can be done at a reasonable expense and tender your vessel to the charterer. Not a word about the time it may require to make the repairs. The plaintiffs made the repairs to the ship "*Venice*," and in April she was tendered to the defendants for a cargo.

The defendants here set up the delay in making the repairs. I am unable to find any case in support of such being an answer to the plaintiffs' claim. The only condition in the charter was the non-arrival of the "*Venice*" at Shelburne before the 1st January; in such case the defendants may cancel the contract on giving notice. The contract was in full force. The vessel had arrived at Shelburne, had left Shelburne and was anchored off St. John harbour, where, by the perils of the seas, she was disabled for a time to take on board the cargo. It was not a cargo that was perishable, nor was the market which it was to go

¹L. R. 6 H. L. Cas. 82.

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to limited to any one season of the year, but which similar cargoes were going to at all seasons, and the defendants were engaged in that trade. See the remarks of Willes, J., in *MacAndrew v. Chapple*.¹ This was an action for not furnishing a cargo. The charter was "shall with all convenient speed (on being ready), having liberty to take an outward cargo for owners' benefit direct or on the way proceed to Alexandria." The vessel went from Newcastle to London and took cargo from there to Constantinople, and was there on the 1st April, 1868, discharged cargo, and on the 1st May was ready to take in cargo in Alexandria. A cargo of cotton was refused, freights had fallen. To this action the defence was deviation and delay. Willes, J., says, "The defendant seeks here to answer the action by setting up a deviation and delay. It is settled in this Court at least that if the deviation and delay have the effect of depriving the charterer of the entire benefit of the contract, or as it has been expressed goes to the whole root of the matter or entirely frustrates the object in view, there is an answer to the action; but a bare deviation short of this only gives an action for damages and does not defeat the charter. From the time of *Boone v. Eyre*,² *Ritchie v. Atkinson*,³ and *Davidson v. Gwynne*,⁴ this has been the rule; and the expressions used in the more recent cases are not new phrases. In the present case I think there was a delay which is to be compensated in damages and does not go to the root of the matter or frustrate the object in view; and it may be observed this vessel was not engaged for a particular cargo, and the matter may have been merely a speculation on the fall or rise of freight. It appears the ship was a few days late at Alexandria, and as the rates were falling, it follows there were a few pounds difference in the freight; the consideration. This being so, apply the above principle and it follows the delay is matter for a cross-action and not for resistance to the present action."

The defendants in this case do not claim that a cargo had been prepared for the "*Venice*." They had several cargoes of deals on hand, were shipping, and continued shipping. The spring shipments might not be so profitable as winter freights

¹ 35 L. J., C. P. 281.

² 1 H. B. 273.

³ 10 East, 296.

⁴ 12 East, 331.

or spring freights. This would doubtless be the answer to the question propounded to McKean and McIntyre, but as it is not a part of the contract, the question was immaterial; if it was important, the charterer should have taken care to provide for it in his contract. It was only what was excepted in the charter-party, the seas, which prevented the vessel loading in January, of what was provided for in the contract. The Court has no power, nor the finding of the jury, to make a contract for the parties other than that which they entered into: and where a ship owner does not agree that his vessel shall arrive at the loading port on a certain day, but only that she shall proceed there with all convenient speed, or what the law would imply, within a reasonable time, and expressly stipulates that this shall be subject to the dangers and accidents of the seas and navigation, I do not see how the contract is to be got rid of containing such an exception. The defendants, if when the accident occurred to the "*Venice*" going on shore, they had given notice, the plaintiffs may not have repaired her in the dead of winter, but lying by until the end of March was rather too late. I do not see how they can escape the fulfilment of the contract they had entered into. In Alleyn 27, *Paradine v. Jane* "when the law creates a duty or charge, and the party is unable to perform it without any default in him and hath no remedy over, then the law will excuse him; but when the party by his own contract creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." So in this case the defendants might have provided against that if the vessel was not ready to receive her cargo in a certain time—as they provided if she did not arrive at Shelburne before the first January, they could cancel the charter-party by giving notice; but we cannot vary the contract and the terms on which it is made.

In *Schilizzi and another v. Derry and another*,¹ under the terms of a charter-party, dated 19th August, 1853, the plaintiffs and defendants entered into a charter-party. The "*Magnolia*" was the defendants' ship, chartered to proceed to Galatz on the Danube and load a cargo. In ballast she drew ten feet of water.

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On the 5th November, 1873, she arrived at the mouth of the Danube. During that summer and autumn the water was unusually low—eight feet two inches. Upon a survey it would not be prudent to take her ballast out and cross the bar. From that time to the seventh January following it was so low that she could not cross the bar, and from the bad weather it was not safe for her to remain off Sulena longer than she did. Galatz is on the Danube, thirty-five miles from the Sulena mouth. The "*Magnolia*" left and went to Odessa and rechartered and took a cargo to Gloucester. The charterer brought an action for not loading at Galatz. The Lord Chief Justice Campbell says, "Then are the defendants excused from performance of the contract by the dangers and accidents of the seas, rivers and navigation? Clearly not. * * * The scarcity of the water from the seventh November to the fifth January, that obstruction was only temporary. On the seventh January the captain might have continued her voyage to the port of destination. When was the contract dissolved?" The other members of the Court concurred. It was only a temporary obstruction which could not dissolve the contract. The contract of charter cannot be dissolved by one party and stand as to the other. The plaintiffs in this case were bound to take a cargo from the defendants—they were both bound by the charter-party—the one to take the cargo on board, the other to furnish the cargo. The repairs to the "*Venice*" were only temporary, and this did not discharge him, nor could the defendants cancel the charter-party without the plaintiffs consenting thereto. I am unable to discover how this case differs from the charter of the "*Magnolia*." There was no release of the ship owner there, nor in this case any release of the defendants from supplying a cargo. Deal cargoes are of commercial value in Liverpool in all times of the year—and freights and deals fluctuate; but that cannot cancel the contract where the cause does not arise upon matters beyond their control or excepted in the contract.

In *Clipsam v. Vertue and others*,¹ a vessel was lying in London and was, on the 28th May, 1842, chartered to proceed to Nantes and there load from the agents of the defendant:

¹ 5 Q. B. 299.

full cargo of flour and wheat, and being so loaded should forthwith proceed to London. The "*Emblem*," instead of going to Nantes proceeded to Newcastle, contrary to the terms and intent of the charter-party, and from thence proceeded to Nantes, and the defendants' agents refused to load here as the voyage had been deviated from, causing an unreasonable delay of thirty-eight days. To the declaration the defendants pleaded the delay caused by the deviation. The Court held the plea bad. Lord Denman said, "So that the principle laid down by Lord Ellenborough in *Havelock v. Geddes*,¹ may apply. The plaintiffs' neglect shall not exonerate the defendant, unless it precludes him making any use of the vessel." Williams, J., says, "What is an unreasonable time is left matter of speculation. To what extent the unreasonable went, whether so far as the voyage was lost, or the cargo could not be put on board, we are not told." Wightman, J.—The plea is "not that she did not arrive in time to enable the defendants to perform the stipulations in the charter-party."

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From these authorities I am of opinion the rule must be made absolute for a new trial.

ALLEN, C. J., and KING, J., took no part.

Rule absolute for new trial.

 MCKEAN, APPELLANT,

AND

THE COMMERCIAL UNION ASSURANCE CO., RESPONDENT.

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February.

Insurance Policy—Conditions—Waiver.

In an action on a policy of insurance for damage to the appellant's house by fire no evidence was given that the preliminary proof required by the policy had been furnished. The only dispute being the amount of damage, the appellant relied upon the fact that the sub-agent had had the damage estimated and that he consented to accept the estimate, as a waiver. The 19th condition declared that none of the conditions in the policy should be taken as waived by the Company unless the waiver was indorsed on the policy and signed by the agent at St. John.

Held on appeal (KING, J., dubitante), that the Court below was right in ordering a nonsuit to be entered on the ground that there was no evidence of a waiver of the preliminary proof.

This was an appeal from the County Court of York County. The action in the Court below was to recover damages for

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injuries sustained by fire, and was upon a policy of insurance made by the respondent company on a dwelling house of the appellant, situate at St. Marys in the County of York. The fire occurred on the 24th of March, 1880, and notice was given immediately after to Mr. Inches, the sub-agent of the company at Fredericton.

Mr. Inches, in his evidence, stated that he told the plaintiff that he would send a person to examine the premises and make an estimate of the damage, and he did send a Mr. Limerick. The appellant said he asked Mr. Inches if he should send a man with Mr. Limerick, and Mr. Inches replied that he did not think it was necessary to do so, as Mr. Limerick's estimate would be satisfactory to both parties. Appellant was not prepared to swear that he would have considered himself bound by Mr. Limerick's estimate if it had been unsatisfactory to him. Mr. Inches also stated that he had the estimate made for the information of the company as he had done in several cases before in order to strike a bargain.

Limerick examined the premises in company with Mr. Inches' clerk and the appellant, and made an estimate of the amount of damages, which was communicated to the appellant, who consented to accept it, and to Inches who immediately informed Mr. Fairweather, the principal agent at St. John, who declined to act upon it; and notice of his refusal was immediately given to the appellant by letter. Mr. Inches afterwards told the plaintiff that Mr. Fairweather was coming up in a few days and that he had better see him and perhaps they could agree.

Mr. Fairweather came to Fredericton, had a conversation with appellant and examined the premises, but nothing was agreed upon.

The appellant gave no evidence of having furnished the preliminary proof of the loss as required by the 14th condition indorsed upon the policy, but relied upon the conversation with Inches and Fairweather and the estimate made by Limerick, under the direction of Inches, as a waiver of the necessity of such preliminary proof.

The 19th condition in the policy declared that none of the conditions should be deemed to have been waived by the company unless the waiver was indorsed upon the policy and signed by the agents of the company at St. John.

The respondents called no witnesses but asked for a nonsuit on several grounds, the material one being that there was no evidence of the delivery of the preliminary proof of loss as required by the policy and no evidence of waiver; and a nonsuit was granted.

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A summons to set aside the nonsuit and for a new trial was moved for on the ground that there was evidence of a waiver of preliminary proof, which should have been left to the jury. The motion was refused and that decision was appealed from.

February 20, 1882. *Rainsford* supported the appeal and cited *The Niagara District Mutual Fire Insurance Company, Appellants, and Thomas Lewis, Respondent*.¹

Wetmore, Q. C., and Harrison, contra, contended, 1st. That there was no evidence of waiver of the preliminary proof. Under the 19th condition the waiver would have to be indorsed on the policy and signed by the agent at St. John. 2nd. That Mr. Inches, the sub-agent at Fredericton, had no power to waive the proof of loss, and cited *Worsley v. Wood*.² [DUFF, J., referred to *Bosh v. Helsham*;³ *Smith v. Gilbert*.⁴]

Rainsford, in reply. It might be that an agreement to waive performance of any of the conditions would have to be indorsed on the policy to be effective against the company under the 19th condition and yet the conditions might be waived by the acts of the company or their agents.

WELDON, J. We cannot get over the 19th condition in the policy and must dismiss this appeal.

WETMORE and DUFF, JJ., concurred.

PALMER, J. I agree. I think the sub-agent had no power to waive the conditions.

KING, J. I am not altogether satisfied that the appeal should be dismissed, but I do not wish to be considered as dissenting from the opinion of the majority of the Court.

Appeal dismissed with costs.

¹ 112 U. C., C. P. 123.

² 6 T. R. 710.

³ L. R. 2 Exch. 72.

⁴ 1 P. & B. 211.

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HALL v. McFADDEN.

February. Intercolonial Railway—Negligence of Conductor—Accident to passenger—Right of action—Contributory negligence.

Plaintiff having a first class ticket from Sussex to Penobscuis by the Intercolonial Railway, intended going to Penobscuis (her home) by the mixed freight and passenger train, which was due to leave Sussex at 1.47 p. m. The train on that day was an unusually long one, and when the passenger cars were brought to the platform the engine was across the public highway. When the train came in it was brought up so that the forward part of the first class car was opposite the platform. It was then about ten minutes after the advertised time of departure. Plaintiff was standing on the platform, when the train came in, but did not then get aboard. The conductor of the train (the defendant) got off the train and went to a hotel for dinner. While he was absent, the train was, without his knowledge, backed down, so that only the second class car remained opposite the platform. The jury found that the first class car did not remain at the platform long enough to enable plaintiff to get on board. The defendant, after finishing his dinner, came over hastily (being behind time and therefore in somewhat of a hurry) called "all aboard," glanced down the platform, saw no person attempting to get on board, crossed the train between two box cars to signal the driver to start (it being necessary to cross the train in order to be seen by the driver, owing to a curve in the track) and almost immediately the train started. The 124th regulation for government of the Intercolonial Railway, prescribes that conductors must not start the train while passengers are getting on board, and that they should stand at the front end of the first passenger car when giving the signal to the driver to start, which he did not do in this instance. Plaintiff and a lady friend, F., who was going by the same train, were standing on the platform, and when they heard the call "all aboard," they went toward the cars as quickly as they could. F. got on all right, but plaintiff (who had a paper box in her hands) in attempting to get on board caught the hand rail of the car, when she slipped owing to the motion of the train and was seriously injured. The jury found that the call "all aboard" was a notice to passengers to get on board.

Held, by ALLEN, C. J., and WETMORE and KING, JJ., that although the plaintiff's contract was with the Crown, the defendant owed to her, as a passenger, a duty to exercise reasonable care, and that there was ample evidence of negligence for the jury. But, per WELDON, J., that the defendant having brought the first class passenger car to the platform, it then became (by the regulations) under the control of the station master and defendant was not liable for starting the train from the position it had afterwards been placed in, also that it was plaintiff's duty to have gone on board as soon as the train came to the station.

A new trial having been granted in this case (see Report in 3 P. & B. 340), it was tried at the Kings Circuit in July, A. D. 1880, before his Honor the Chief Justice. The plaintiff, who at the time of the trial was a young woman about twenty-one years of age had, with a friend, a Mrs. Freeze, purchased at Penobscuis Station of the Intercolonial Railway a first class ticket to Sussex and return. After attending to some shopping in Sussex they came to the station, intending to return home by the mixed freight and passenger train which was due to leave Sussex at 1.47 p. m. The train, which was in charge of

the defendant as conductor, was late in arriving, and the plaintiff was standing on the platform when it came in, having in her hands a paper box about eighteen inches long, about twelve inches wide and four inches deep, containing light articles. When coming in, the train was brought up so that the whole of the second class car and the forward part of the first were opposite the platform. A number of passengers alighted, and, with the defendant, went across the street to a hotel for dinner. While the defendant was away the train was backed down, so that no part of the first class car was opposite the platform, and the only way in which the plaintiff could then have got aboard was by stepping from the platform on to the second class car, and passing through to the first, or walking down the platform to the end, where there were steps, and getting on the first class car from the ground. The train was a very long one and could not be kept in a position to allow of the first class car being opposite the platform without the engine being across the public highway. The plaintiff, however, remained with her friend on the platform until she heard the defendant cry "all aboard" and saw the train start. They hurried down the platform and attempted to get aboard while the cars were in motion. Mrs. Freeze succeeded in getting aboard, but the plaintiff in attempting to do so fell and was hurt by the car wheel striking her ear, and injuring her so that partial deafness resulted.

The defendant stated that he was behind time that day—in fact that when the train arrived it was after the advertised time of departure. That when he came over from dinner he called "all aboard," glanced down the platform but saw nobody attempting to get aboard, that he then crossed the train to the opposite platform, where, owing to a curve in the track, he was obliged to go to see the engine-driver, gave the signal to the driver and the train started. Several witnesses were called, whose testimony will be found sufficiently referred to in the judgments.

Several questions were left to the jury, which, with the answers, were as follows:—

1. Was the first class car, or any part of it brought up in front of the platform when the train arrived at Sussex; and if so, did it

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1882. remain there long enough to enable the plaintiff to get into that car from the platform?
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When the conductor called "all aboard" the first class car was not at the platform.

2. Was the call "all aboard" a notice to passengers to get into the cars?

It was.

3. Was any part of the first class car opposite the platform when the conductor called "all aboard?"

We believe it was not.

4. Was the train moving when the conductor called "all aboard?"

We think not.

5. If the train was not then moving, did the conductor allow sufficient time for the passengers to get into the cars after that call?

We think not.

6. Did the box which the plaintiff had in her hand interfere with her getting on the train, and would the accident have been avoided if she had had the use of both hands at the time?

We think it did not interfere.

7. Was it negligence on the part of the plaintiff, attempting to get on the train while in motion, and did that fact contribute to the accident?

We think it did not.

We are all agreed on the above answers.

No. 1.—Five of the jury found that the cars did not remain long enough at the platform to let plaintiff get on board.

Other questions were left to the jury at the request of counsel but were not answered.

Verdict for the plaintiff—damages \$2000.

In Easter term, 1881, *Burbidge*, for the defendant, moved for a new trial, relying upon the points contained in the following notice of motion:—

Take notice that the defendant will at the ensuing Michaelmas Term move for a new trial in this cause on the following grounds:

1. For that His Honor the Chief Justice did not nonsuit the plaintiff or direct a verdict for the defendant at the close of the plaintiff's case on the grounds then stated, namely:

(1) That the action will not lie, as no matter what the form of action is, the right to recover, if any, depends upon a contract between the plaintiff and the Crown to carry the plaintiff with reasonable safety, she exercising ordinary care to avoid accident.

(a) The defendant's duty is to the Crown.

(b) The plaintiff's remedy, if any, is against the Crown.

(c) If the plaintiff was a passenger, her action is on the contract to carry.

- (d) If she was not a passenger she had no right to attempt to get upon the train, and in doing so was a wrongdoer and could not recover. 1882.
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- (e) To entitle the plaintiff to recover there must be a breach of duty to the plaintiff. A breach of defendant's duty to the Crown is not sufficient.
- (f) The defendant was subject to the directions of his superior officer, the station agent, both being servants of the Crown.
Minchin v. Clement; ¹ *Alton v. Midland Railway Company*; ² *Winterbottom v. Wright*; ³ *Levy v. Langridge*; ⁴ *Collis v. Selden*; ⁵ *Brand v. Troy and Sch. Railway*. ⁶
- (2) There was no evidence of negligence on defendant's part to leave to the jury.
- (a) The alleged negligence was in starting the train too soon, and it was not proved that the defendant started it. It was under control of the station agent, and if defendant did not start it he was not liable. The plaintiff's witnesses proved that the train was in motion before defendant called "all aboard" or gave any signal.
- (b) It was not the defendant's, but the station agent's duty to have brought the train up to the platform the second time. He left it in proper position.
- (3) There was positive evidence of contributory negligence on the part of the plaintiff.
- (a) The plaintiff having proved as a part of her case, acts and omissions, which *per se* amount to negligence, and these acts and omissions having caused or directly contributed to the injury complained of, the defendant was entitled to have the case withdrawn from the jury. Ros. N. P. (14 ed.) 698, and cases there cited; *Dublin Railway Company v. Slattery*. ⁷
- (b) The train was ten or fifteen minutes late, and plaintiff was there when it arrived. She could have gone on board before it was started, the passenger car being at the station while she was there.
- (c) She attempted to board the train while it was in motion, contrary to the railway regulations, which have the force of law, and that too when she was encumbered with a box and when she would not have been inconvenienced by remaining over, her duties not being important and there being other trains that same day.
- (d) She should not have attempted to board the train while in motion; she should have gone on board while it was at the station, or have gone through the second class car and gone on board first class car after they had been backed up and were waiting, or have gone down the steps of the platform and gone on board from the ground, or requested the station

¹ B. & A. 252.² 19 C. B., N. S. 213.³ 10 M. & W. 109 and 115.⁴ 4 M. & W. 337.⁵ L. R. 3 C. P. 495.⁶ 8 Barb. 368.⁷ L. R. 3 App. Cases 1168.

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agent to bring the cars up to the platform, or remaining after they had been started have requested the station agent to stop the cars and have them backed in again to enable her to go on board, or else have remained over resting upon the contract with the Crown to be carried from Penobsquis to Sussex and return. Government Railway Regulations, 1876, (Acts 1877, pp. cv., cvii., cxi.), Nos. 46-48, 67 and 120, 125, and others.

Knight v. Ponchartrain R. R. Company; ¹ *Hubgh v. New Orleans and Carrollton R. R. Company*; ² *Siner v. Great Western Railway Company*. ³

(e) The rule against persons getting on or off a moving train will be construed more strictly against those getting on than against those getting off; in the latter case the person is likely to be carried to a place to which he does not wish to go as well as away from the place of his destination, and might reasonably take greater risk than one who is simply left where he is. Nothing will justify a person in getting upon a car in motion.

(4) The learned Chief Justice under the circumstances should have compelled the plaintiff to consent to leave being reserved to enter a nonsuit or a verdict for the defendant: per Byles, J., in *Siner v. Great Western Railway Company*.

2. Misdirection or non-direction.

(1) In not directing the jury to find for the defendant on the grounds mentioned in the first paragraph hercof and the several subdivisions of that paragraph, except that there was evidence that plaintiff started the train, but no evidence that he started it improperly. It was proved that when he gave the call "all aboard," he saw no one about to get on board, and then crossed to the other side and gave the signal to start. If there were no passengers he was not bound to wait. It was proved that he had to cross to give the signal, and the regulation does not say "he must" but that "he should" stand at the front end of the first passenger car when giving the signal.

(2) In telling the jury that "the platform was the place provided for the passengers to get on and off the train, and that they were entitled to have the car in which they were to be passengers brought up to the platform for that purpose, and they were not obliged to go down upon the ground in order to get in the car, and to climb up into it from the ground; and that a first class passenger was not bound to get into a second class car and pass through to the first class car, and that he was entitled to have the first class car brought opposite the platform and to remain there a reasonable time to enable him to get in," without at the same time calling the jury's attention to the following facts:

¹ 23 La. Ann. 462 (1871).

² Ib. 492 (1871).

³ L. R. 4 Ex. 117.

- (a) That none of these things were imposed as duties on the defendant; that it was the duty of the Government to provide ample conveniences for passengers, and that if their platforms were not long enough to enable long trains of cars to be properly brought up to the platforms, or if they placed their stations so close to highways that trains could not be properly brought up to platforms without impeding traffic, or if they did not afford a passenger having a ticket an opportunity of obtaining the conveyance for which he had paid they might well be held responsible, but that the defendant owed no duty in this respect either to the Government or to the passenger, and without calling their attention to the fact that the defendant having left his train in proper position, he owed no further duty in that respect either to the Government or the passenger. Its position at the station and the time and position of starting it were under the control of the station agent, and the defendant was not responsible for any breach of duty on the part of the station agent.

- (b) That the action should have been against the Crown on the contract, for unless the conductor was held responsible for the acts and omissions (if any) of the Crown and of defendant's superior officer no recovery could be had.

(3) In telling the jury "that a first class passenger is not bound to get into a second class car and pass through it to the first class car, he was entitled to have the first class car brought opposite the platform, and to remain there a reasonable time to enable him to get in." It is submitted that the exigencies of railway traffic, of which both court and juries may take notice, render it impossible for all passenger trains to be brought opposite the platforms, that there are some trains the passenger cars of which exceed in length the longest stations and are many times longer than some of the stations; that passengers must pass through from one car to another, and that there is no more danger or inconvenience in passing through a second class car to a first class car than from a first class car to another of the same kind. In this case it would appear that the traffic along the highway to Sussex would have been impeded if the first class car had been kept even with the platforms. At least the question whether it would or not should have been left to the jury. It is submitted that His Honor's ruling in this respect would render traffic impossible on a road such as the Intercolonial. Mellor, J., in *Siner v. The Great Western Railway Company*.¹

(4) In telling the jury that "if the words 'all aboard' were intended as a notification to passengers to get into the cars they were not obliged to get in till that notification was given and they were entitled to a reasonable time to get in after such notification was given." It is submitted that His Honor should have directed the jury that the plaintiff should have gone on board immediately after the arrival of the train, she being then there, and the time for departure of the

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¹L. R. 4 Ex. 122.

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train having already arrived ; that the call "all aboard" was a notice to people to look out that the train was about to start, which the conductor is not bound to give, but which is given as a warning only ; or that if the call was a notification to passengers to get on board it was a notification to get on board a stationary and not a moving train contrary to law. As soon as the train started, and by plaintiff's own evidence it started when she was yet a good distance from the car, the notification was at an end, the plaintiff got on at her own risk.

(5) In telling the jury that "if the defendant started the train without waiting a reasonable time, and the accident occurred in consequence, it would be negligence for which he would be liable" without directing the jury that if when he called "all aboard" he saw no one in the act of getting upon the train he was not bound to wait any longer, it being twenty or thirty minutes after the time for departure, and it was proper for him to cross over the cars and signal the driver to start, and that the accident was due to plaintiff's negligence in attempting to board a train in motion.

(6) In submitting the 1st, 2nd, 3rd, 4th and 5th questions to the jury without the directions suggested in the two preceding subdivisions (4 and 5) of this paragraph.

(7) In not telling the jury that it was such negligence in plaintiff to attempt to get on a train in motion as to preclude any recovery on her part, especially as she was encumbered with a box.

It is submitted that His Honor the Chief Justice should have directed the jury to this effect, and not have left the matter to them as he did by the 6th and 7th questions.

(8) In not telling the jury that the plaintiff ought not to have attempted to get on board a train in motion ; that if the conductor's call was anything more than a notice that the train was about to start and to look out, it was at most only a notice to get on the cars before they started ; that even if it could be considered an invitation to get on board the train while in motion, plaintiff was not bound to accept the invitation ; that the plaintiff had other courses and remedies open to her which she should have followed and taken. She should have attempted to get on the cars before the call and if no opportunity had been given her to do so, she should have requested the station agent to give her that opportunity. Failing to do that when the cars started and she was yet upon the platform of the station she should have requested the station agent to recall the cars and let her get in ; or she should have waited until the next train, a matter of no great inconvenience according to her own testimony. If the station agent had refused, or she had remained over, and it had been shewn that she had not been offered an opportunity to get on board she would have a right of action against the Crown on the contract to carry her from Penobscuis to Sussex and return.

(9) In not telling the jury that under these circumstances the action would not lie against the conductor, that the remedy, if any, was on the contract to carry with safety, etc.

(10) In not telling the jury that there was no evidence of negligence on the part of the defendant.

(11) In not telling the jury that the evidence of negligence on the part of the plaintiff directly causing or contributing to the injury was positive and explicit, and that therefore she was not entitled to recover.

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3. Verdict against evidence.

(1) All that is alleged against the defendant, for which he is at all responsible, is that he did not wait long enough after calling "all aboard." It was proved that when he gave the call he looked down the platform and saw no one preparing to go on board. It was not shewn on the other side that at that time anyone was in the act of going on board or attempting to go on board. The plaintiff herself was standing still near the station door. The time for departure had elapsed. Under these circumstances the defendant was right in starting the train.

(2) It is clear that the plaintiff herself occasioned the accident by attempting to get on board the cars while in motion, and encumbered with a box, and not adopting any of the courses pointed out in the 8th sub-section of the last paragraph. The finding of the jury on the sixth question can be reconciled with the facts in this way only that they found that the cars were moving so fast, when plaintiff attempted to get on board of them, (see evidence of plaintiff and Mrs. Freeze and others), that the accident was inevitable and that the having of a box in her hand made no difference, that it must have occurred at all events. If that is the effect of the finding, it only shews the more clearly the extent of plaintiff's recklessness.

(3) It was clearly proved by Chealey and Robertson that the first class passenger car remained at platform long enough for plaintiff to get on board, and no sufficient evidence to the contrary to support the finding of the jury.

4. Verdict against the weight of evidence, as in the last paragraph mentioned.

5. Verdict against law and evidence.

(1) The plaintiff's remedy, if any, is against the Crown on the contract. The defendant was the servant of the Crown and not responsible for the acts of his fellow servants of the Crown.

(2) There was no evidence of negligence on the part of the defendant.

(3) The plaintiff by her own negligence caused or directly contributed to the injury complained of.

6. Excessive damages.

Authorities:—Cases and Railway Regulations referred to above; *Philips v. Renselaer and Saratoga R. R. Company*; ¹ *Chicago and Alton R. R. Company v. Randolph*; ² *Bridges v. North London R. R. Company*; ³ *Cockle v. The London and South-East Railway Company*; ⁴ *Foy v. London B. and South Coast Railway*; ⁵ *Redfield on Railways*, 5 Edition, pp. 240, 241, 243, 244, 245, 246, 247, 248, 249,

¹49 N. Y. 171 (1872).

²53 Ill. 610 (1870).

³L. R. 6 Q. B. (Ex. ch.) 377; 7. H. L. 213.

⁴L. R. 5 C. P. 467; 7 C. P. (Ex. ch.) 821.

⁵18 C. B., N. S., 225.

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He also cited the following additional cases :—

Lewis v. London, Chatham and Dover Railway Company; ¹ *Owen v. The Great Western Railway Company*; ² *Weller v. London, Brighton and South Coast Railway Company*; ³ *Curtis v. Detroit and Milwaukie Railway Company*.⁴

Barker, Q. C., and C. A. Palmer, contra. It is clear that the defendant invited the plaintiff to get on board his train, and that he did not give her an opportunity to get on board. It was his duty to see that his cars were in a proper position to enable her to do so.

One might as well invite persons to get under a window and then crush them.

Although the conductor may not be bound to give the call "all aboard," yet, if the custom is to do so, it becomes important.

Admitting the principle of *Alton v. Midland Railway Company* that the right to bring the action is confined to the person with whom the contract is made, the converse does not follow.

The defendant's duty was to act in a reasonable and proper manner; but the jury found that the train was not stopped at Sussex Station a reasonable time to enable her to get aboard.

Siner v. The Great Western Railway Company was questioned in *Robson v. The North Eastern Railway Co.*⁵

A person having a first class ticket is entitled to get into a first class car.

What the conductor should do it is his duty to do. If the railway is so built that he can't do it, that does not prevent him owing the duty to the passenger.

The train cannot be called back except under exceptional circumstances.

Allusion is made to Regulation 124, that passengers shall not get on a moving train; but passengers having a right to suppose that the invitation will be carried out, are not fairly subject to having the conductor take the position that the passenger—being in that position when he must decide on the instant—had acted on the invitation.

¹L. R. 9 Q. B. 66.
²46 L. J. Q. B. 486.
³L. R. 9 C. P. 123.

⁴27 Wia. 158.
⁵L. R. 2 Q. B. D. 85.

In *Jackson v. McLellan*¹ the principle is recognized that until the last moment a party is justified in supposing that what is right will be done. That was the position of the plaintiff here. Not having allowed a reasonable time the defendant has no right to turn round and say to her, "you had no right to incur the danger of getting on a moving train."

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These are all questions for the jury—including the meaning of the words "all aboard."

Owen v. The Great Western Railway Company relied on by the other side is entirely different from this.

It has been decided by the Court already, that the plaintiff has a right of action—that it is not necessary to proceed against the Crown.

The time-table is not applicable to this case as the time was up when the train came in.

The damages are not excessive.

Burbidge and W. Pugsley were heard in reply.

Cur. adv. vult.



The following judgments were now delivered:

KING, J. The questions arising in this case are chiefly these: first, was there any obligation on the defendant to use care towards the plaintiff; then, if so, was there a breach of such obligation; and in the next place, if there was such breach of duty, was the injury complained of caused by it. A fourth question arises as a matter of defence, viz., whether any negligence of the plaintiff so contributed to the immediate cause of the injury as that, but for such negligence, no such injury at all would have been sustained.

And first, as to whether there was any obligation on the defendant in starting the train to use care towards plaintiff. The contention for the defendant is that he owed no duty whatever to the plaintiff in respect to which an action will lie; and that the plaintiff's only remedy is against the carrier, either as for breach of contract, or breach of duty under the contract. It is true that the injuries were sustained in the course of the execution of a contract of carriage between the plaintiff and the crown, to which contract the defendant was no party, but this is not of itself conclusive against a right of action by

1882. the plaintiff against the defendant. Thus a carrier, who in fact performs the act of carriage, is liable to the passenger for injuries received by him through the neglect of such carrier, although no contract for carriage, either express or implied, exists between such carrier and the passenger, and although such carrier is simply performing the carriage by arrangement with another carrier with whom the passenger has a contract of carriage. This was decided by the Court of Appeal in *Foulkes v. The Metropolitan Dist. Ry. Co.*,¹ adopting and extending the principle as laid down by Blackburn J., in *Austin v. The Great Western Ry. Co.*² In *Dalyell v. Tyrer*,³ (cited by Thesiger L. J., in *Foulkes v. the Metropolitan Ry. Co.*, *supra*), the plaintiff had made a contract with a public ferryman, under which the latter was bound to carry him daily for a certain period; the ferryman, being unable upon a particular day to work the ferry, hired a boat and crew for the purpose, and an accident having occurred to the plaintiff through the mismanagement of a rope by the crew, the owner of the boat and crew was held liable to him. I cite these cases, not as entirely applicable to the facts here, where there was no actual carriage or control by defendant of the person of the plaintiff, but to show that it is not an answer to this action to allege that the injury was sustained in the course of the fulfilment of a contract between the plaintiff and another, and under circumstances which would make such other person liable for the injury upon or in respect of his contract of carriage.

What then was there here to impose upon the defendant any obligation of care towards the plaintiff in starting the train? "Some acts," says Bramwell B., in *Degg v. The Midland Ry. Co.*,⁴ "are absolutely and intrinsically wrong where they directly do an injury, others only so from their probable consequences. There is no absolute or intrinsic negligence. It is always relative to some circumstance of time, place or person. Thus the act of firing or riding fast in an enclosure becomes wrong if the person doing it sees there is some one near whom it may damage, but the act is a wrong in him only for the personal reason that he knows of its danger." The use or control of things dangerous to human life has always been regarded as

¹ L. R. 5 C. P. D. 157.² L. R. 2 Q. B. 442.³ 28 L. J., Q. B. 52.⁴ 1 H. & N. 773.

imposing a duty of care upon the person having such use or control. In *Dixon v. Bell*,¹ the defendant having left a loaded gun with another sent a young girl after it with a message to such other person to remove the priming before delivering it to the girl; this was done, but not effectually; and the girl on her way home with the gun, thinking that it would not go off pointed it at plaintiff's son and pulled the trigger; the gun went off and injured the boy, and the defendant was held liable in an action. So in *Reg. v. Dant*,² it was held that the turning of a horse, known to be vicious, into a place where persons might reasonably be expected to be, was negligence sufficient to sustain a conviction for manslaughter, where death resulted from a kick of the horse, although the prisoner had a right of pasturage in such place, and although it was doubtful whether the deceased had a right to be where she was. The principle of law is thus expressed by Stephen J., in *Reg. v. Salmon and others*:³ "There is a duty tending to the preservation of human life to take proper precautions in the use of dangerous weapons or things. (It is the legal duty of every one who does an act which without ordinary precautions is or may be dangerous to human life, to employ these precautions in doing it." See also *Carter v. Towne*.⁴ I have hesitated to refer at such length to principles so well settled, but it has seemed to me that their application to the facts of this case has not been sufficiently apprehended.

The danger to human life incident upon the character of railway locomotion is one of the circumstances affecting the degree of responsibility of the carriers of passengers by railway. Thus in *Pennsylvania Ry. Co. v. Roy*,⁵ the Supreme Court of the United States say: "In *Philadelphia and Reading Ry. Co. v. Derby*,⁶ it was said that when carriers undertake to carry persons by the powerful and dangerous agency of steam, public policy and safety require that they be held to the greatest possible care. This doctrine was expressly affirmed in *Steamboat New World v. King*.⁷ In *Stokes v. Saltonstall*,⁸ affirming the decision of Taney, C. J., on the

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¹ 15 M. & S. 198.
² 11 Jurist, N. S. 549.
³ L. R. 6 Q. B. D. 70.
⁴ 98 Mass. Rep. 567.

⁵ Am. Law Reg. for April 1881.
⁶ 14 Howard 488.
⁷ 16 Howard 474.
⁸ 13 Peters 181.

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circuit, we said that although the carrier does not warrant the safety of the passengers at all events, yet his undertaking and liability as to them go to the extent that he, or his agent where he acts by agents, shall possess competent skill, and so far as human care and foresight go he will transport them safely."

Now it seems to me that the following circumstances (supposing them to exist) are sufficient to raise a duty of care and caution by the person having control of the starting of a railway train towards one having a right of passage by it, and entirely irrespective of contract, viz., the control of such an instrument of danger, the right of the passenger to get aboard, the knowledge or reasonable means of knowledge of the person having control of the train that the passenger is present and seeking to exercise his right, and the knowledge or reasonable means of knowledge by such person that the probable consequences of starting the train too soon or without ordinary precautions will be to put the passenger in peril and possible danger of his life in exercising his rights. Without saying that all these circumstances must concur, it seems to me that their concurrence raises a duty of caution, to the extent at least of requiring the observance of ordinary care. Accordingly we find that the railway authority, following doubtless the common practice of railway companies, has prescribed certain precautions to be observed by conductors in the starting of passenger trains, which seem well fitted to secure safety, and by the observance of which in this case this particular accident could not well have occurred. The 124th regulation directs that "the conductor must not give the signal [to the driver] to start while passengers are getting on board; and should when making it stand near the front end of the first passenger car." If the regulations have the force of law, as contended by the learned counsel for the defendant, this regulation would seem to impose a duty on the conductor, irrespective of any other consideration whatever; at all events it prescribes what are the proper precautions to be taken in the starting of a passenger train. As a good deal of discussion took place as to the conductor's duties under this regulation, and as to its application to a case like the present, where, from a curve in the road and the length of the train, the signal to

the driver could not be seen by him if given from the platform side of the train, I think I may as well express my opinion here upon the meaning of the regulation. The regulation, while applicable to all cases, is to be interpreted by the cases that ordinarily occur, and I do not think it can be doubted that in such cases the conductor is to stand on that side of the train where the passengers are getting aboard. If he is obliged by necessity to leave the point mentioned in the regulation in order to give the starting signal, he should not leave such point while passengers are getting aboard; and as he can leave only upon necessity he should be away from the prescribed place for the shortest possible time necessary to accomplish his purpose. In this view the assumed difficulty of carrying out the 124th regulation would in fact be practically no difficulty at all, for he has simply to wait at the prescribed place until the passengers getting on board are on board, and then cross a few feet from one side of the passenger car to the other side of it; and as it would be to this point on the train, viz., at the forward end of the first of the passenger cars, rather than to any other point of the train that the driver would naturally look for the conductor's signal it would be the fittest place from which to give it. And further, in my opinion passengers are getting on board, within the meaning of this regulation, when they are present on the platform doing all they reasonably can do to get on board.

The first question of fact as bearing on the liability of defendant is whether or not he had control of the train, in the sense of having a right to exercise any discretion in the starting of it. It is said that he was bound to start the train when he received the signal from the station master. The 124th regulation, already referred to, disproves this. The conductor cannot start until he gets the signal from the station master, but after getting it the train is under his control, and while it is his duty forthwith to run the train to the next station, he is expressly prohibited by the regulation from starting the train while passengers are getting aboard. He is also (independent of all regulations) subject to an obligation to exercise care.

The next question is whether or not the plaintiff had a right to get on the train at the time it was started. She held a

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ticket that entitled her to travel by the first class car on this train. Under this contract the carrier was bound to provide reasonable facility and opportunity to get on board during a reasonable time before and up to the time when the carrier was entitled to start the train within his contract; and the plaintiff would be entitled to the whole of such time to exercise her right of getting aboard, and was not bound to get on at one time during such period rather than at any other time during such period. What are reasonable facilities must depend on all the circumstances, and the jury have in effect found that no such reasonable facility and opportunity was afforded to her at any time either before or after the call "all aboard." And so the plaintiff was then in the position of using, as she had a right to use (subject to this, that she should not act imprudently) such facilities as were in fact accorded to her; and I think that it appears from the evidence and the findings that she did all she reasonably could do to get on board.

The next question on the evidence is whether defendant knew, or had reasonable means of knowing, that the plaintiff was endeavoring to get on board: Here is the defendant's account of it. He says:—

When we came to Sussex we came up to the platform so that we could get off from both cars. I went up to McLean's to dinner and left the train as it was. * * * We were about ten minutes late that day and were about ten minutes at dinner. * * * When I got to the station door, the south door, I called "all aboard." The train was not then in motion. I did not know at this time that the train had been backed down. I should say that the east end of the first class car was about opposite the door of the ladies' waiting room when I left to go to dinner. When I called "all aboard" I looked down the platform, and saw no person making for the train to get aboard. I then crossed the train between the first and second box cars, ahead of the second class car. I crossed the train to give the signal to the driver to start. I could not do it from the side I was on, on account of the curve in the road. The train started in a few seconds.* It takes a considerable time to start a train of 19 cars. I should say the engine would start twenty feet before the passenger car would move in a train of that length on account of the couplings.

* * * After the train started I got on board the second class car. I heard a call that somebody was hurt.

Cross-examined.—We were late and I was in somewhat of a hurry. I should say it was a minute, probably more, from the time I called "all aboard" till the train started. I should say it would take more than a minute for me to cross the train, give the signal, and for the

train to start. A minute would not give plaintiff time to go down off the platform and get in the first class car. It would give her time to get into the second class car. * * * I did not see the plaintiff and Mrs. Freeze on the platform when I came out and called "all aboard." To a Juror—When I called "all aboard" I can't say whether any part of the first class car was opposite the platform. If I saw any person trying to get on board I suppose it would be my duty to see that the car was brought up to the platform.

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The defendant says that he did not see the plaintiff or any other person trying to get on board. It not being found as a fact that he did see her, I assume that he did not see her, and that therefore actual knowledge is not found. But I think that defendant's evidence, taken in connection with uncontradicted facts, shows that he had reasonable means of knowing that the plaintiff and others were trying to get on board. The train was a passenger train, and he, as its conductor, might reasonably expect that there would be passengers; then his call "all aboard," being as was found by the jury a notice to passengers to get on board, shows that he contemplated the probability or possibility of there being passengers desirous of getting on board. He says that when he called "all aboard" he looked down the platform and saw no one making for the train to get on board, and that at that time he did not see the plaintiff or Mrs. Freeze on the platform; but in fact they were there, and seeking to get on the train, and seeking so earnestly that Mrs. Freeze, who was with plaintiff, did in fact get aboard in the short time that was afforded her; and further it does not appear that there was anything to prevent them being seen with ordinary care in observation. The imperfect observation of defendant is shown in another circumstance. He says that when he called "all aboard" he did not know that the train had been backed down. When he left to go to dinner, the east end of the first class car was about opposite the door of the ladies' waiting room, and he supposed it was still there when he started the train; but the train had been backed down and the first class car was then beyond the west end of the platform. The station master says that the train had been backed about a car length or a car length and a half. It is therefore evident that the defendant failed to notice what was his duty to notice, and what with

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ordinary observation he could hardly fail to notice ; and this mis-apprehension of the state of things may have led him to look for passengers in the place where they would not be. The explanation of it is doubtless that he was, as he himself says, in somewhat of a hurry in consequence of being behind time. Then also it is clear that if defendant had stood where the regulation says that he should stand, viz., at the forward end of the first passenger car, he could not have failed to see the passengers endeavoring to get on board. He would also have seen that the first class car was not where he supposed it to be, and could have had it moved up to the platform, according to his own statement of what he should consider to be his duty in such case.

The next question is : Did defendant use due care in starting the train ? The facts before considered required of the defendant that at least ordinary care should be observed. The facts showing want of care are these : that he acted hurriedly when he ought to have acted deliberately ; that he started the train from the east end of the first box car when by the regulations he should have been at the forward end of the first passenger car, where he could have seen the passengers and provided for their safety ; that he started the train when, according to the regulations, he had no right to start it, that is to say, when passengers were getting aboard ; and (apart altogether from regulations) that after notifying passengers to get aboard he at once proceeded to start the train as if there were no passengers to get aboard, when he might or ought to have seen that there were such passengers.

Turning now to a few matters alleged in defence ; I have already shown that there was nothing in the particular facts of the case to have prevented a substantial compliance with the 124th regulation. Then it is said that the conductor is not responsible for the position in which the train stood, and that he was bound to start the train from the position in which it had been placed by the station master. But, in the view I take of it, the defendant is not liable to plaintiff for not giving proper facilities for getting on, nor for starting the train without giving such facilities, but for starting the train when he might reasonably know that with the facilities the plaintiff had, he was putting

her in circumstances of danger in exercising her right, by starting the train as he did. I should also be inclined to think (if the matter were at all material) that if the performance of his duties, as enjoined by the 124th regulation, were not possible by reason of the station master having left the train in a certain position, the conductor should either himself move the train to a position enabling him to discharge his duties, or require the station master to do so, and that failing to do either, he would be taken to adopt the act of the station master. Then it is said that the call "all aboard," if a notice to passengers to get on board, was at most a notice to get into the cars before they started, and that when they started it ceased to be such a notice. I would agree with this, if the notice is to be treated as an invitation in the sense in which the term is used as forming a ground of liability. It cannot be said that injury sustained by getting on a train known to be in motion is sustained by reason of the plaintiff trusting in defendant's invitation to get on board a stationary train. But the defendant having given the call "all aboard," and thereby notified all the passengers who intended going by the train to get on board at once, or within a reasonable time, he must be taken to have contemplated that the passengers would at once seek to get on in the way reasonably appropriate for each under the circumstances and according to the facilities that were afforded them, and therefore he would know that if he started the train before they had time to get on board he would put them in danger. In such case his starting of the train prematurely would not deprive them of their rights. Then as to the facilities afforded for getting into the first class car; the first class car was beyond the platform, and until the call "all aboard," the plaintiff could not know that it would not be brought up to the platform.

There being then some evidence of negligence, the next question is whether the injury complained of resulted from the act of defendant. As the immediate effect of starting the train was simply to leave the plaintiff behind, and so damage her in a right not available against all the world nor against defendant, with whom plaintiff had no contract, I at one time doubted whether the defendant could be liable for the more remote

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damage which would not have happened but for the voluntary act of the plaintiff in trying to get on the train; but this was not argued as an objection, and moreover if the ground of defendant's liability is as I have stated it to be, the personal injury might well be a mischievous consequence reasonably to be anticipated as resulting from the negligent act. *Rigby v. Hewitt*;¹ *Greenland v. Chaplin*;² *Rose v. N. E. Ry. Co.*³

Next as to contributory negligence. It is not indeed necessary for a person to abandon his rights merely because another has made their exercise to some extent dangerous. It is a question of degree; and the amount of danger and the circumstances which led the plaintiff to incur it are for the consideration of the jury. *Clayards v. Dethick*.⁴ The question is whether the danger is so obvious that a person of common prudence would not venture it. I confess I do not see how it can be reconciled with common prudence for a person in the position of the plaintiff here to attempt to get on a train that had gone five or six rods, and had gained quite a motion, and to attempt this with but one hand free and that the left hand, and to do so carrying a box 18 inches long, 12 inches wide and 4 inches deep. It seems to me that there was an obvious danger to life, which the plaintiff had no right to run, unless she took the risk herself; and it seemed to Dunham, one of her witnesses, to be so, as he says he intended getting on at the rear of the train on account of the danger. Of course the test is not what the Court shall think to be prudent, but what the Court shall think that ordinarily prudent men should think to be prudent. Even then I think it difficult to see how ordinarily prudent men could come to this conclusion, but two juries appear to have done so, and the matter is peculiarly one for a jury.

As to the damages, they seem excessive, and I think them fairly subject to the observations of Parke B., in *Armsworth v. S. E. Ry. Co.*,⁵ and of Brett J., in *Rowley v. London and N. W. Ry. Co.*⁶ But as this view is not concurred in by any other member of the Court, I am not disposed to adhere to it; and for the reasons given (but not without considerable doubts on

¹ 15 Ex. 240.

² 5 Ex. 243.

³ L. R., 2 Ex. D. 243.

⁴ 12 Q. B. 439.

⁵ 11 Jurist 759.

⁶ L. R., 8 Ex. 221.

the question of contributory negligence) I think that the verdict should be sustained.

WETMORE, J. In *Lewis v. The London, Chatham and Dover Ry Co.*,¹ Blackburn, J., in sustaining verdict for defendants at p. 71 says: "I see no evidence in this case of an act on the part of the company's servants to induce or to justify her in alighting at the spot where she was getting out. From all the circumstances she, as a reasonable person, must have believed that the train which had passed the platform would come back again; that it would not stop under the bridge and let the passengers in the further carriages get out upon the line and consequently she had no business to get out at the place she did *unless the company's servants told her to do so.*" [The under-scoring throughout the authorities is my own]. "There was therefore no evidence from which the jury could have reasonably found negligence." In the present case did not the defendant himself tell or invite the plaintiff as all other passengers to get in by calling out "all aboard," and the jury have found calling out "all aboard" was a notice to passengers to get into the cars. In the case cited the learned judge saw no evidence of an act on the part of the company's servants to induce or justify the plaintiff in alighting where she did. Here we have the positive act of the defendant himself inducing the plaintiff to get on board the cars—the express invitation which the jury found to be notice to passengers to do so. Mr. Justice Blackburn (page 71) did not agree "that calling out the name of a station is an invitation to passengers to alight, on the contrary the name of a station is generally called out as the train is passing on. Calling out the name of a station is not an invitation to alight. *Cockle v. London and South Eastern Ry. Co.*,² is distinguishable." Quain, J., at page 72, says: "With a knowledge of the station and without any express invitation to alight and without having the door opened for her by the porter—only having heard "Bromley" called out—which is done to give notice to the passengers that the train has arrived at that particular station, and that they were to prepare to alight, she gets out. The company had done no act to induce her to believe that the train had arrived at a

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¹L. R. 9 Q. B. 66.²L. R. 7 C. P. 321.

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place where it would stop so as to justify her in assuming that the company had given her an invitation to alight at that particular spot."

In *Bridges v. Directors, etc., of North London Ry. Co.*,¹ in head note, is a question whether calling out the name of a station is an invitation to the passengers going to that station to alight there, citing *Weller v. The London Brighton, etc., Ry. Co.*² See page 132, Brett, J.: "I agree that to call out the name of the station before the train has come to a standstill is no evidence of negligence on the part of the company. I also agree that merely overshooting the platform is not negligence. But if the porter has called out the name of the station and the engine driver has overshoot the station and the train has come to a standstill, the company's servants are guilty of negligence if they do not warn passengers not to alight."

Goddard's evidence.—"When the conductor wishes the passengers to get on board he calls out 'all aboard.' The passenger cars wait long enough for passengers to get aboard after they call 'all aboard.' They did not do on this occasion as they usually do."

Cross-examination of Robert McKean, the baggage master, one of the defendant's witnesses.—"The signal 'all aboard' is for the passengers to get on board; this is done at all stations. Passengers don't generally get on till this warning is given; some do. It is usual after this signal is given to wait a reasonable time for the passengers to get on before the train starts. The time was very short between the signal 'all aboard' and the starting of the train; it was very short, only a few seconds. On re-examination.—"If the conductor sees no passengers getting on the train he starts at once."

William F. Downey, witness for defendant.—"The train left pretty quick after he called 'all aboard.' The call 'all aboard' and the starting of the train were so near together that I could not tell what the distance of time between them was."

Defendant, in his evidence, says: "When I called 'all aboard' I looked down the platform and saw no person making for the train to get aboard." To a juror.—"If I saw any person trying to get on board I suppose it would be my duty to see that the car was brought up to the platform."

¹L. R. 7 E. & L. Ap. 213.

²L. R. 9 C. P. 126.

Considering the authorities cited as to what might amount to an invitation to alight, or a justification for so doing, and from the evidence I have quoted, it seems very clear to me there is abundant evidence to have justified the plaintiff in proceeding to go on board the car, supposing the car not to have been in motion. I shall refer to the car being in motion in a subsequent part of my judgment.

As to the train being under control of the station master while at the station: By rule 67 at page cvii Acts 1877, the station master is to direct the conductor of a train when to start, and he must use every exertion to ensure punctuality. Rule 120: Until the train has started *the conductor* shall be under the direction of the station master. Though the conductor is under the direction of the station master until the train starts, by rule 120, would not the train itself as to starting be under the conductor's control? The station master is to direct the conductor when to start, rule 67, but what has the station master to do with the train itself? The driver must not start his train till the bell is rung and he receives the signal from the conductor, rule 178. Rule 168 does say the engine driver when at the station shall be subject to the orders of the station master. I apprehend that this does not apply to starting the train. Before leaving the station he shall see that the cars are properly coupled, etc., etc. The "*he*" being under the heading conductors and from the general context of the rule unquestionably means the *conductor*. No doubt the conductor has no right to start until he receives a direction from the station master, but after receiving the order I can see nothing to justify him in starting until the train is in proper running order. Suppose a wheel or axle was out of order and in an unfit state for running the train, the conductor would not be justified in starting merely because the station master gave a signal for starting. The conductor is to signal the driver to start. If the train was to start immediately on the station master giving direction, why would not the rule provide the signal to start be given to the driver? The reasonable construction of the rules I think is that when the signal is given the conductor is to start as soon as the train is in proper running order, and *they* must not give the signal to start while the passengers

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being complied with; besides the rule is *they* must not give the signal (this means both the station master and the conductor.) Now what was there to prevent the *station master* standing near the front end of the first passenger car, as required by the rule, if it was necessary for the conductor to pass across the cars to the opposite side of the road in order to signal the engine-driver, which it appears he did, and the conductor being signalled by the station master from his position, or some other employee, near the front end of the first passenger car? Whether there would be any difficulty or not the rule says the signal to start must not be given while the passengers were getting on board, and that neither the conductor nor the station master was near the front end of the first passenger car where the rule expressly requires that one of them should have been, and it is reasonably apparent if either of these officers had been stationed where the rule expressly required an officer to be, he would have seen the passengers approaching the passenger car to board the train, and, without doubt, could and likely would have prevented the accident by delaying the starting of the train until the passengers were on board, or warning the passengers of the danger. The defendant did signal starting the train without knowing whether the passengers were getting on board the train or not, for from his position on the opposite side of the railway he could not know whether passengers were getting on board the train or not. Such a proceeding, I think, may very reasonably be classed as negligence. It may not be immaterial to bear in mind this action is brought against the conductor who signalled the starting of the train and not as the English cases are against a company for the negligence of the company's servants.

Then as to contributory negligence by reason of the plaintiff having attempted to board the train while it was moving. Rule 48: No person must be allowed to get into or upon or quit any car after the train has been put in motion or until it stops. *Any person doing so or attempting to do so has no recourse upon the Railway Department for any accident which may take place in consequence of such conduct.* This action does not happen to be against the Railway Department. Under this rule no doubt the proper officer could prevent any person

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from getting on a train in motion. It did not appear the plaintiff knew of this regulation, or had any right to suppose there was such a rule. The conductor, whose duty I think it was to see the passengers get on board properly, and that there was no violation of any of the railway rules, was the person to whom passengers might look for protection and direction. He thought proper to call "all aboard," proved to be a signal, a notice for the passengers to get on board; also proved that after giving such notice he thought proper not to allow a reasonable time for the passengers to get on board before starting the train. The witness Goddard says the "all aboard" was called about two or three seconds before the cars started. He was pretty sure *the signal was given before the cars started*, but there was no chance to do so; a smart young man might have got into the passenger car between the time the order was given and the starting of the car, but *an elderly person or a woman could not do so*. One of the defendant's witnesses, Downey, says the call "all aboard" and the starting of the train were so near together that he could not tell what the distance of time between them was. In cases of personal injury there must of necessity be a contribution to the injury by the person injured. The fact of the plaintiff being there as a passenger was such, for if she had not been there she certainly would not have been injured. This contribution must be an illegal, improper or careless act. A violation of the rule she did not appear to know anything about would scarcely be considered an illegal act. By Rule 1 a copy of the rules and regulations printed on a sheet and framed will be hung up in every station, conductor's room, engine house, repair shop, etc., where it will be open for inspection *by every employee* of the railway, and no plea or excuse for ignorance of the rules and regulations will be admitted should any employee not have received a copy. This part of the rule may have been attended to though it was not proved. The knowledge of the rules seems to be for the railway officials and not for passengers. Considering part of Rule 48: No person must be *allowed* to get into or upon or quit any car after the train has been put in motion or until it stops. Does this not imply that some person is to be at the car to prevent passengers getting on moving

trains? The 124th Rule: That the conductor must not give the signal to start while passengers are getting on board, and should when making it stand near the front end of the first passenger car, and that he should afterwards pass to the platform of the last car and look out for any signal that may be given. A rule provided, it would seem, expressly that the railway officials should be in a position to prevent passengers getting on the train when in motion, and which rule, if observed, would materially protect passengers from accident. Part of rule 135: And must use all possible means to prevent passengers exposing themselves to danger; and Rule 17, which requires great care and watchfulness in order to prevent injury to persons or damage to property, and where a doubt may exist as to the proper course to pursue, they must take the safe side and not run unnecessary risk. (The whole of which rules seem to have been entirely disregarded). To follow the direction of "all aboard," as is proved the invariable signal for passengers to get on board the train at all the stations, can scarcely be construed into such an improper or careless act as would preclude the plaintiff from recovering on the ground of contributory negligence. When the signal was given to start, the conductor should have been at his post to prevent passengers getting on the moving train. Again, when the signal to get on board was given, the plaintiff was bound to use all reasonable expedition in getting on board. She was not sure whether the cars were moving when the "all aboard" was called, having been called on to get on board by the conductor, and in acting upon such call and quickly, I do not think she was required to exercise the same amount of consideration as if there was time for reflection upon the danger of boarding a car in motion. Plaintiff could not say whether the train was moving when the conductor called "all aboard." On cross-examination she said the cars were going pretty fast when she tried to get on. In her direct examination she says there was a jolt of the car, her foot slipped and she fell between the platform and the car. The train, it would appear, had not time to have got in anything like rapid motion. The responsibility under the circumstances of the present case should rather rest upon the conductor who gave the call to the passengers to get on board, and

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who should have been at his post near the front end of the first passenger car to see passengers were not allowed to get on while the cars were in motion, and against whom the action is brought. In *Robson v. North Eastern Ry. Co.*,¹ referring to *Bridges v. North London Ry. Co.*,² Lord Coleridge, C. J., says: "It may be said that the view of the House of Lords is that in these cases if there is any evidence at all it is for the jury and not for the judge to say whether there was any negligence on the part of the company." Lord Coleridge distinguished Siner's case, L. R. 3 Ex., 150 and 4 Ex., 117, from the case in hand, as in the former case there was not an invitation for the passengers to alight. In *Cockle v. London and South Eastern Ry. Co.*,³ in such a state of circumstances the passenger was justified in getting out, and there was evidence of negligence on the part of the company. The Lord Chief Justice there says, page 326: "The foregoing case appears to us in point to the present as establishing that an invitation to passengers to alight on the stopping of a train without any warning of danger to a passenger who is so circumstanced as not to be able to alight without danger, *such danger not being visible and apparent amounts to negligence.*" His Lordship proceeds: "It is not necessary here, any more than in *Praeger v. Bristol and Exeter Ry. Co.*,⁴ to say what would be the effect if a passenger should alight *when the danger was visible and apparent as where a passenger gets out in broad day trusting to his ability to overcome the difficulty.* In the case before us the place where the plaintiff was left to get out was not lighted, and she could not see and was not aware of the interval which separated the carriage from the platform, and got out believing she was about to step on to the platform. We think that the leaving a carriage which has been brought up to a place at which it is unsafe for a passenger to alight, under circumstances which warrant the passenger in believing that it is intended he shall get out, and that he may therefore do so with safety without any warning of his danger, amounts to negligence on the part of the company, for which *at least in the absence of contributory negligence on the part of the passenger, action may*

¹L. R. 2 Q. B. D. 87.

²L. R. 7 H. L. 213.

³L. R. 7 C. P. 321 (Ex. ch).

⁴24 L. T. (N. S.) 105.

be maintained." Referring to *Bridges v. North London Ry. Co.*,¹ his Lordship says, page 327: "In that case there was no evidence that the train had come to a final stand still, or, in other words, arrived at the point where the company's servants intended the passengers to alight. The question therefore was whether there was evidence of anything done by the company's servants which induced the passengers to believe it had so arrived and act on that belief." Here the train was about leaving, and unless the plaintiff got on board when notified to do so by the conductor she must have been left behind. By rule 3 every employee shall make himself thoroughly acquainted with the rules and regulations of the railway. Rule 17.—The employees of the railway are to exercise great care and watchfulness in order to prevent injury to persons or damage to property, and, when a doubt may exist as to the proper course to pursue, *they must take the safe side and not run any risk whatever.* In *Dublin, Wicklow and Wexford Ry. Co. v. Slattery*,² Lord Hatherley says: "I will, in the first place, state my concurrence with Mr. Justice Barry's opinion in the Court below, (Ir. Rep. 10 Com. Law, at page 270), viz: when once a plaintiff has adduced such evidence as if uncontradicted would justify and sustain a verdict, no amount of contradictory evidence will justify the withdrawal of the case from the jury. But I concur also in the opinion expressed by Chief Baron Palles, (Ir. Rep. 10 Com. Law, 287,) that when there is proved as part of the plaintiff's case, or proved in the defendant's case, and admitted by the plaintiff an act of the plaintiff, which *per se* amounts to negligence, and when it appears that such act caused or directly contributed to the injury, the defendant is entitled to have the case withdrawn from the jury." The invitation to go on board would have similar effect as to alight. Had there been anything amounting to evidence for the proof of an invitation to alight in *Bridges v. North London Ry. Co.*, a very different conclusion probably would have been arrived at. Here there was a specific invitation, a notice for the passengers to get on board, one that is always adopted, as appears from the evidence, at all the stations, and for the purpose of notifying the passengers to get on board, so understood and acted

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upon, and found by the jury in the present case to be a notice to passengers to get into the cars. *Cockle v. London and South Eastern Ry. Co.*, as already mentioned, clearly justifies a passenger in alighting if the carriage is brought to and left at a place under circumstances which warrant the passenger in believing it is intended he shall alight. Applying the same reason, why should not a specific notice to the passengers to get on board be a justification for the passengers to get on board? We have the plaintiff with a ticket that entitles her to a first-class passage waiting to get on board and notified to get on board by a railway official, who had, I think, full authority to give such notice, and the plaintiff, in accordance with such notice, endeavoring to get on board. In doing so, by reason of an alleged too hasty ordering the cars in motion by the official, she complains to have sustained a damage for which I think she is entitled to recover, unless she has so contributed to the injury as to preclude her right to recover. It is evident the cars were in motion, and doubtless it is a very dangerous risk to attempt getting on a train when in motion. It is, however, not likely she appreciated the extent of the risk, or, in all probability, she would not have attempted it. Having been notified to get on board, and having obeyed the notification, and the jury having found it was not negligence on the part of the plaintiff attempting to get on the train while in motion, and that fact did not contribute to the accident, though I am free to confess I have some doubts in the matter, I am not prepared to say the verdict should be interfered with on this ground. The jury arrived at a similar finding on the previous trial. I find in the notice of motion for a new trial a proposition that the learned Chief Justice should have directed the jury that there was such contributory negligence as precluded the plaintiff from recovering, a proposition I do not accede to. I do not find complaint of anything the Chief Justice said or omitted to say as to what would prevent any apparent contributory negligence from preventing her recovering damages. If the law establishes the hard and fast rule that a plaintiff cannot recover damages for an injury sustained by reason of getting on board a train in motion, no matter what the surrounding circumstances may be or what the emergency, and that created

by the defendant himself, there is an end of the matter. But if the law is that where an official having the control of the train, which I think the conductor had, after receiving notice from the station master to start the train, notifies a passenger to get on board though the cars are in motion, and in obedience to such notice the passenger does attempt to get on board and sustains damage by reason of endeavoring to get on board in obedience to such notice, the obedience to the conductor's notice is not *per se* such contributory negligence as will preclude a recovery of damages, though the cars are in motion. I think the more reasonable view is that under all the surrounding circumstances, the emergencies of the case, the matter should be a subject peculiarly for the consideration of the jury, and they should decide whether there was contributory negligence to preclude a recovery under existing circumstances. The jury having ignored contributory negligence on the plaintiff's part, I am not, while confessing a feeling of doubt on the point, prepared to ignore the finding of the jury. Then as to plaintiff only having a claim to be enforced by petition of right on the contract to carry from Sussex to Penobsquis, whatever claim the plaintiff might have in this form I do not see anything to prevent her recovering against the conductor himself for damage caused by his negligence. The damages, \$2,000, do not seem to me to be excessive under the evidence, if they were larger than I might be disposed to assess them at if I had been on the jury which I do not mean to say they are. *Morton v. Bartlett*,¹ as decided by a majority of the Court seems to preclude our interfering with the verdict on the ground of excessive damages. Any question of wilfulness scarcely arose in that case. The plaintiff took the course he did for the purpose of testing his right to get off and on at different stations on a through ticket, and the action was to determine such right. The points I have remarked upon seem to me to cover all that is necessary for the decision of the case. I see nothing in the others to require interfering with the verdict. I do not see sufficient grounds for disturbing the verdict.

WELDON, J. This is an action against the defendant, a conductor of a train of the Intercolonial Railway from Saint John

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towards Moncton, for negligence in starting the train from Sussex towards Moncton, the plaintiff being a passenger from Sussex. The railway belongs to the Dominion Government. The regulations to guide the station masters and conductors are laid down in Statutes of Canada, 1877, appendix cii. The train of which the defendant was conductor was a long one, consisting of seventeen freight cars and two passenger cars—first and second. The train arrived ten minutes late. The plaintiff had been waiting on the platform in company with another person, Mrs. Freeze. A passenger who came up in the train from Saint John to Sussex in the first class car got out on the platform, went to McLean's, got his dinner and returned to the car. The conductor came out of McLean's. Not being able to give the signal at Sussex station from the platform, he crossed the train to the opposite side to give the signal to the driver to start. Saw no person making for the train to get on board. A train of the length of 19 cars would not start very quickly on account of the couplings. "All on board" was called out by the conductor as he passed through the train to give the signal. The train began to move after the signal was given. Mrs. Freeze was ahead of the plaintiff going into the car when she heard "all aboard" called by the defendant. She stepped on to the car, and plaintiff following her to get on the car, her foot slipped, and, having a parcel in her right hand, caught the up and down railing with her left hand; she fell between the platform and car, and sustained the injury for which this action is brought to recover compensation.

The defendant contends that he is not liable in this action, having followed out the directions of the regulations prescribed by the Government, that having brought the train of which he had charge to the railway station as near as he could get, his duty there ended. The train being a very long one, the platform not being of sufficient length, to bring the passenger car up to the platform was impracticable, and, if only the forward part of passenger car could come to platform, was no fault of his. It belongs to the Government to have the platform long enough to embrace the passenger car. The platform was not provided by the defendant; he was merely a servant of the Government. His duty ended when the train reached the

station, the head of the train extending to the highway. Whether the rear of train came to platform or not was not a matter for which he could be made liable, the defect was in the length of the station, which he could not control. The question then is, can the defendant be made liable unless he violates the regulations made for his guidance, and thus be guilty of a misfeasance which produced the injury complained of.

The defendant's duty ended when the train arrived at the station, and did not commence again until he had orders or a signal from the station master, when he must give the signal to the engine-driver to go ahead. At the Sussex station, from the length of this train, the conductor could not give the signal to the driver. The head of this train curves from the station, and the conductor had to pass through the second class, or baggage car, to the opposite side, to give the signal. He saw no passengers in the act of getting on board, and after passing through the car, and where he could give the signal to the driver, he gave it. The 124th regulation says: "They (the conductors) must not give the signal to start while passengers are getting on board, and should, when making it, stand near the front end of the first passenger car, and then pass to the platform of the last car." There is nothing in the regulation stating on which side of the car the conductor must stand. It is quite evident to me he must stand on that side of the car from which he could make a signal to the driver. No other construction can, I think, be given to this regulation, and I am of opinion that his doing so was not a wrongful act by him and would not be a misfeasance. *Morton v. Bartlett*¹ does not apply to this case; there a trespass was committed on the person of the plaintiff by the defendant. In the present case no such act was done by the defendant, but, seeing no person to get on board the cars from the platform, he passed into the cars to enable him to give the signal to the driver, and must have been at the head of the car through which he passed, in compliance with the regulation. The defendant had no power to change the position of the cars or train when he had his orders from the station master to start. It is no part of the conductor's duty to call out "all on board" by the regulations and

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¹ 2 Pugs. 215.

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orders for his guidance; and therefore the meaning to attach to those words could not be for the train to wait a reasonable time for the passengers to get on board. Who was to judge of the reasonableness of the time? The regulation, No. 46, directs passengers to purchase tickets at least five minute before the advertised time of the departure of the train. This train was not up to time on its arrival at the station, being ten minutes behind, and therefore the announcement, "all on board," could not apply to the plaintiff who was waiting for the train. That the fore end of the passenger car was up to the platform when the train arrived, there can be no doubt, and so the jury find. Thomson, a passenger, says: "I got out on the platform." Chesley says the same, and the defendant says: "I came there myself with Mr. Thomson." The train was left there. The duty of the conductor, the defendant, then ceased, until the station master directed him to start.

I am unable to discover any negligence on the part of the defendant to amount to a misfeasance or any violation of his duty. But it is urged the question of negligence must be left to the jury. It may be so in actions against the railway company, but that is a disputed point. It can hardly be said that there was evidence of any negligence on the part of the defendant. He brought the train to the station. He left it there. He was absent 15 or 20 minutes. When he received his orders from the station master he started the train. There was time for all passengers who were waiting for the train coming, which was due and after time, to be on board. He saw none. He gave the signal to start from the only point he could see the driver.

In *Tuff v. Warman*,¹ the proper question for the jury is there laid down, viz.: whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary and common care and caution, that but for such negligence or want of ordinary care and caution on his part the misfortune would not have happened.

In *Fordham v. The London, Brighton and South Coast Ry.*

¹ 15 C. B., N. S. 585.

Co.¹ "In an action against a railway company for an injury occasioned by the negligence of the guard of a train, the evidence was that the plaintiff in getting into a railway carriage put his hand on the hinged side of the door of the carriage which was standing open, and, before he had got quite in and taken his seat, the guard came and without any warning slammed the door upon the plaintiff's hand and so jammed it between the door and the door post. It appeared from the plaintiff's evidence at the trial that there was no handle to get into the carriage by, or at least none that could be seen, it being dark at the time. Held, affirming the decision of the court below that there was evidence of negligence on the part of the defendants, and there was not such clear evidence of contributing negligence on the part of the plaintiff, that the judge at the trial ought to have withdrawn the case from the jury."

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This case shows two acts by the defendants: that of no handles to assist passengers, and the guard slamming the door without warning.

The case of *Richardson v. The Metropolitan Ry. Co.*,² is similar to the last case cited, injury to the hand, but the guard gave due warning before shutting the door. The Court held the accident was attributable solely to the plaintiff, and there was no evidence of negligence by the defendants, and that there was evidence of negligence by the plaintiff.

In *Siner and wife v. The Great Western Ry. Co.*,³ the plaintiffs were passengers on an excursion train of the defendants. On arriving at the station for which they were bound, the train being longer than the platform, some of the carriages, the one on which the plaintiffs were, stopped at a point beyond the platform. It was then daylight. The plaintiffs were neither told to get out nor remain in the carriage. There was no servant on hand. Other passengers got out, and after waiting a few minutes the male plaintiff got out. His wife, taking both his hands, jumped as carefully as she could from the iron step to the ground, and, in so doing, sustained the injury for which this action was brought. No offer was made to back the train so as to bring the carriage to the platform, but no request was

¹ 38 L. J., C. P. 324.

² 37 L. J., C. P. 300.

³ 38 L. J., Ex. 67.

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made to the defendants' servants to do so. It was not shewn that the length of the platform at the station was inadequate to the ordinary traffic of the place. Held by Byles, Mellor, Montague Smith and Hannen, JJ.,—Keating, J., *dissentiente*,—that the accident arose from the acts of the plaintiff, and there was no evidence on the defendants' part to leave to the jury.

In *Cockle v. The South Eastern Ry. Co.*,¹ there the engine driver drew up the train short of the proper place, so that the last carriage, in which was the plaintiff, was opposite to the receding portion of the platform. There was no light at this end of the platform, which was lighted only at the other end. The train having stopped for a few seconds, but the name of the station was not called out, the plaintiff opened the door, stepped out, and fell into the chasm between the carriage and the platform and was injured. Among those who came to help the plaintiff was an inspector, who said it was the driver's fault in drawing up short, and the train eventually proceeded from the spot without drawing up further. Held by Bovill, C. J., and Brett, J., that there was evidence for the jury of an invitation to alight and negligence of the defendants, without contributory negligence of the plaintiff, while Keating, J., and Montague Smith, J., held a contrary opinion.

In *Gee v. The Metropolitan Railway*,² there the plaintiff, in company with his brother, was travelling on an underground railway. The question which the jury had to consider from the evidence was whether the defendants had not, when the train left the station, failed to see that the door was properly fastened in the ordinary manner in which such doors are fastened. Kelly, C. B., says: "I think it was their duty to see that the door was fastened before it left the station, and the fact that it flew open was evidence that it was not properly fastened. The degree of pressure applied by the plaintiff was not sufficient to account for its flying open." Grove, J., says: "We may assume that it was the ordinary case of a railway door which shuts from the outside and can only be conveniently shut from the outside. Such a door is jammed to with such force to enable the latch to fill and hold the door firm, and it would be extremely inconvenient if it had to be shut by the

¹ 39 L. J., C. P. 226.

² 42 L. J., Q. B., 106.

passengers inside. This being the case, the ordinary duty of the servants, when a train leaves the station, would be to shut and firmly fasten the latch of the door, and they are deviating from their ordinary practice, and, I think, their ordinary duty, if they omit to shut the doors." Brett, J., says: "I apprehend negligence consists in this: that where something happens which would not in the ordinary course happen, if ordinary care and skill were used, there is evidence on which a jury may find that there is negligence on the part of the defendant. Now here a railway door upon a slight pressure flies open.

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* * * I think, therefore, there was evidence on which a jury might properly find that there was negligence on the part of the company's servants."

In this case the fault was that of the porter in not having the door properly fastened, and for which the company were liable. No case can be found where the servants of a railroad company are held liable, or an action has been maintained against them. *Morton v. Burtlett* was a trespass for a personal wrong. An Act of the Legislature was passed to make the Commissioners of this railway, when owned by the Province, liable in actions for negligence in conducting the trains which ran prior to Confederation. When the railway became the property of the Dominion Government, their employees on the railway were bound to obey the regulations made by the Government, and they were not personally liable for carrying out such regulations.

The case of *Bridges v. The North London R. Co.*,¹ on appeal to the House of Lords.—The case had been tried before Blackburn, J., who being of opinion that there was no evidence of negligence for the jury nonsuited the plaintiff, but owing to a strong opinion expressed by the jury in her favor the learned judge reserved leave for the plaintiff to enter a verdict in her favor, if the Court should be of opinion there was any evidence of negligence on the part of the defendants which would properly be left to the jury, and took the opinion of the jury what would be proper damages. Liberty was given for the Court to draw any inferences or find any facts from the facts stated in the case. The Court of Queens Bench sustained the

¹ 43 L. J. 153.

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ruling of Mr. Justice Blackburn that there was no evidence for the jury. The case was appealed to the Exchequer Chamber. Four Judges affirmed the decision of the Queen's Bench, three Judges dissenting. From that decision, an appeal was taken to the House of Lords. The following question was submitted to the Judges:—"Whether on the facts stated in the special case and having regard to the liberty thereby given to the Court to draw any inference or find any fact from the facts therein stated, there was evidence of negligence on the part of the respondents which ought to have been left to the jury."

The Judges gave their opinions in favor of the plaintiff. Baron Pollock in his judgment says:—"I do not think it necessary for the decision of the question put by your Lordships, that the courts should be able to say exactly how the accident happened; but I may be permitted to say that judging from the statement in this case, and from the place and from such inferences as I draw from both, I feel satisfied that the accident happened through negligence of the defendants or their servants in not having some person, either guard, porter, policeman or some other person, either by voice or light to prevent passengers from running the risk of falling on the heap of hard rubbish which lay alongside of the hinder carriage of the train on the night in question.

"It is however unnecessary to decide whether a verdict for the plaintiff on this ground would have been one in which if I had been on the jury I should have concurred. It is enough to say that in my judgment there was evidence upon which a jury might reasonably find that the accident happened wholly through the negligence of the defendants in not providing for the safe alighting of passengers at that place, on that night, and under those circumstances."

Brett, J., says:—"The cases to which your Lordship's questions refer are cases in which a passenger by railway brings an action against the Railway Company to recover damages for injuries alleged to have been incurred by reason of the negligence of the defendants or their servants. What is the direction in point of law which ought to be given to the jury at the trial? It is this—that the plaintiff founds his claim upon an allegation that he has suffered injury by means of the

negligence of the defendants or their servants. If he has so suffered from such a cause his claim is well founded, because it is an implied part of the contract of carriage that the company and their servants will use reasonable care and skill in the conveyance of the passengers to their agreed destination. And if the company or their servants have been negligent or wanting in reasonable skill in the conveyance, and the passenger has been injured, then there has been a breach of contract for which the company are liable and for which the passenger is entitled to compensation."

I refer to the opinions of these two eminent Judges to shew the mixed character of the action for negligence made up of the company and their servants, and that is the negligence complained of,—not an action against a servant who may have called out the station which induced the passengers to get out.

Lord Chelmsford, in giving judgment, says: "In this state of things I will point to your Lordships in the first place that there are some state of facts which are perfectly clear and admit of no dispute. It is perfectly clear that before this accident occurred the train had come to a stand still. It is perfectly clear that the carriage in which the deceased was seated was inside of the tunnel. It is equally clear that there was no platform opposite that part of the tunnel where the carriage stopped. It is perfectly clear that the tunnel, at the place in question, was, even on a clear night, imperfectly lighted; and, on the night in question, the tunnel being filled with steam, practically, it was without light. It is perfectly clear, if the deceased in that state of things got out in the tunnel opposite the rubbish, he was exposed to the imminent danger of receiving a fall from alighting on the rubbish heap, in place of on the platform. Up to that point it appears to me that there neither is negligence nor evidence of negligence to go to a jury." His Lordship then stated what other evidence was given, which was a passenger heard a warning "keep your seats," after which the train moved to the station. The servants had previously called "Highbury," a station at which the train was intended to stop, and the requisite time having elapsed for any passenger to leave the carriage, the same servants corrected their mistake and called out "*keep your seats*," thereby admit-

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ing the first call was an invitation to leave their seats, and this without explanation or contradiction from the other side was evidence which should go to the jury of negligence on the part of the company.

The case of *Bridges v. The North London Railway*, lays down this rule. In action for negligence the rule is that from any given state of facts the judge must say whether negligence can legitimately be inferred, and the jury must say whether it ought to be inferred.

In *The Metropolitan Railway v. Jackson*,¹ on appeal to the House of Lords, the action was brought for negligence in not safely and securely carrying the respondent, who had become a passenger on the appellants' line of railway, and injuring his thumb by the act of the appellants' servants in suddenly and negligently closing the door of the carriage in which the respondent was travelling, and by injuring his thumb by the violently and suddenly closing the door; and the question was whether there was any evidence at the trial of this negligence which ought to be left to the jury. Three Judges in the Common Pleas Division held there was no such evidence. The Appeal Court, Cockburn, L. C. J., and Amphlett, L. J., held the same, and Kelly, C. B., and Bramwell, L. J., held there was not. All previous cases to 1878 were referred to. The Lord Chancellor says: "There was not at your Lordships' bar any serious controversy as to the principles applicable to a case of this description. The judge has a certain duty to discharge and the jury has another and different duty. The judge has to say whether any facts have been established by evidence from which negligence may be reasonably inferred. The jury has to say whether from those facts, when submitted to them, negligence ought to be inferred. It is my opinion of the greatest importance in the administration of justice that those separate functions should be maintained distinct. It would be a serious inroad on the province of a jury, if, in a case where there are facts from which negligence may be reasonably inferred, the judge were to withdraw the case from the jury on the ground that in his opinion negligence ought not to be inferred, and it would on the other hand place

¹ 47 L. J., 303.

in the hands of a jury a power which might be exercised in the most arbitrary manner if they were at liberty to hold that negligence might be inferred from any state of facts whatever." His Lordship then proceeds to state the evidence which has been given in the Court below and the observations of the learned Judge. He then goes on to say: "That your Lordships did not in the case of *Bridges* lay down, and I am satisfied did not intend to lay down, any new rule on this subject. It is indeed impossible to lay down any rule except that which at the outset I have referred to, namely, that from any given state of facts the judge may say whether negligence can legitimately be inferred, and the jury whether it ought to be inferred." The Lords O'Hagan, Blackburn and Gordon concur most fully in the opinion expressed by the Lord Chancellor. The judgment appealed from was reversed and a non-suit ordered to be entered.

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The Counsel for the plaintiff contended that the Court decided after the first trial that this action was maintainable. I think they lay down no such decision. Mr. Justice Duff says after recapitulating certain facts as proved and referring to *Robson v. The North Eastern Railway Company*, that principle is applicable to the present case: "If it be shewn the plaintiff was at the station before the time mentioned in the time table for departure for Penobsquis had elapsed, and she had been afforded no opportunity of getting into the first class car from the platform, there being no such evidence, and on the ground of misdirection he thought there ought to be a new trial." That was the decision of the Court and went no further than that. That the action was maintainable for negligence. But whether this is so, after carefully reading the evidence, I feel bound to say I do not discover from the same any negligence on the part of the defendant to make him liable in this action. That the plaintiff did sustain an injury there can be no doubt—but was the defendant the cause of it? What the length of the train was or the shortness of the platform at the station he cannot be affected by this. His duty is to bring the train to the station and his obligation and responsibility are ended; there is no doubt of that, and so the jury find. If the first class car or any other car was removed from the platform the defendant

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is not answerable for that. If the train was so long that the passenger car could not remain at the platform while the conductor was at his dinner, he is not liable for that, for the train was under and subject to the station master. When the conductor had his orders from the station master to start he must obey, subject only to passengers entering the cars. The regulation requires the conductor to be at the front end of the first passenger car. He was unable to make a signal or call to the driver from the side of the car next the station from the curve in the road, and had from necessity to pass through the cars to the opposite side to give the signal. This would not be a violation of the regulation 124, which does not confine the starting of the train or giving the signal from any particular side of the train. This I am of opinion was not a wrongful act so as to make it a misfeasance. The call of "all aboard" was, I should judge, "all aboard" to mean the train was ready to start, an invitation to the driver and other employees of the railroad, and that passengers should take their seats; there is nothing in the regulation to intimate such a call necessary, or that passengers should wait for the call beyond the time the train was to start. The train arriving later than the time fixed for arrival, passengers should have been ready to enter the cars on arrival, and when the passengers on board came out of the cars. What length of time the cars should remain at the station would be determined by how many were ready to go on board. The cars, the jury find, were brought to the platform on coming from St. John to Sussex, and there the duty of the conductor ceased; if the car was removed from the platform afterwards can he be responsible for that? Certainly not. The train moved when he called out "all aboard," or, as Mrs. Freeze states, it was moving when the conductor came out of the station and called out "all aboard." If the train was moving when the defendant came out of the station house it was no act of his which caused it to move, and on that ground no fault could be imputed to him. The train as he left it, he had a reasonable ground to believe he would find it, and start it according to directions. He saw no person attempting to get into the cars and therefore gave the signal to the driver from the only place it was possible to do so from the head of the passenger car.

The defendant having done no more than carrying out the duty required by the regulation, I am of opinion he cannot be made liable for any damage a passenger receives in getting on or off cars. There must be some misfeasance on his part, and no responsibility attaches to the conductor beyond what is contained in the regulation, and unless he violates those he is not liable in this action. If the length of the train was such that the passenger car which would be in the rear could not be brought in front of the platform to enable passengers to get on and off, the conductor has nothing to do with such an omission on the part of the government to provide such accommodation for the passengers.

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The question as to the mis-direction of the learned Chief Justice, the charge would properly be correct if it had been an action against the owner or proprietors of the road. All actions in the Books are against companies, and in this I am of opinion the learned judge laid down the rules applicable to their case. Take the third paragraph in the printed case. "If the first class car did come up to the platform, did it remain there a reasonable time to enable passengers to get on board from the platform?" The defendant brought the end of the passenger car to the platform, from which he and the passengers landed at the platform. The defendant's duty then ended. Whether it remained there, or how long, was no part of the defendant's duty to ascertain. It ceased, and the station master had control. The train being of such length that the passenger car could not be brought up to the platform for passengers—there was no liability attaching to the conductor or the station master. This was a duty of having proper stations belonging to the government, and I am of opinion that part of the charge may have led the jury to believe it was the duty of the defendant to have this done, where in fact it appeared the train was of such a length that he could not do it, and if the position of the car was altered after the defendant left it, he was not liable for that.

I am of opinion the object of the rule requiring the passengers to get their tickets five minutes before the train is to start evidently conveys the impression that no delay is to take place. The call "all aboard" is rather to intimate the passen-

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gers are on board, and the driver receives his signal if he can from where the conductor to give it stands.

As to the other questions as to the plaintiff being contributory to the injury she received, the plaintiff admits the cars were in motion when she attempted to get on board; the box which she had in her right hand would prevent her using it, and whether two hands to assist a person in entering the cars would not be better than one. I may not be able to arrive at the same conclusion which the jury have done.

I express no opinion on these points, but fully entertaining the opinion that the defendant is not liable in this action, I confine myself to that—but as no leave was granted to enter a non-suit, I am of opinion the rule should be made absolute for a new trial.

ALLEN, C. J. I agree with the majority of the Court as to the plaintiff's general right to maintain the action. The facts of the case, and the authorities bearing on the question have been so fully considered, that it is unnecessary for me to refer to them.

As to the question of contributory negligence, if I had to determine it, it is quite possible that I should not have come to the same conclusion as the jury have done; but it was a matter for them to decide, and they have negatived it.

The damages are probably larger than I would have been disposed to give, particularly in the absence of any evidence but that of the plaintiff herself, that she has been permanently injured. It would have been more satisfactory if there had been evidence of some competent professional man on this point; still, there is the evidence of the plaintiff herself, given four years after the injury, that she is deaf in one ear, and never was so before the accident. If this is the case, and her deafness was caused by the accident, and will be permanent, the damages are not too large.

Very probably the jury were influenced by the idea that the Government would pay the damages. The evidence of that, if objected to, ought not to have been received, and I pointed out to the jury that they ought not to be influenced by any such consideration. There is no standard of damages in actions of this kind, as there is, to some extent, in actions on

contract. Actions of tort are governed by looser principles in the matter of damages than actions of contract. In *Mayne on Damages* 23, it is said that in actions for injuries to the person, "it is difficult, if not quite impossible, to fix any limit, and the verdict is generally a resultant of the opposing forces of the counsel on either side, tempered by such moderating remarks as the judge may think the occasion requires." I told the jury that if the plaintiff had been permanently injured she was entitled to compensatory damages, according to her station in life, greater of course than if her injuries were only temporary. They must not be influenced in the amount of damages by the fact that the railway was a government work, and perhaps the government might pay any damages recovered; the government was not bound to do so. The damages must be estimated according to the plaintiff's injury, and as if the defendant alone was responsible. Mr. Mayne further adds that where it has been pointed out to the jury what grounds of complaint may be allowed for in damages, the amount is entirely in their disposition; and "a new trial will only be granted when the verdict is so large as to satisfy the court that it was perverse, and the result of gross error, and to prove that the jury have acted under the influence of undue motives or mis-conception." The case of *Morton v. Bartlett* has been referred to on this point; no doubt the cases are distinguishable, as has been pointed out, for there the act of the defendant was deliberate and intentional; here it was not so, still I think the damages are not so excessive as to justify us ordering a new trial.

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Barristers' Society.] The Bye-Laws of the Barristers' Society relating to the admission of Attorneys, approved by the Court in Easter Term last, were not published until May. Two students-at-Law, who, under the new Bye-Laws, might have been admitted in Easter Term, had no notice of the rules, and came up at this Term for examination. The Barristers' Society having recommended their admission, the Court, under the peculiar circumstances of the case, allowed the applicants to be enrolled, stating, however, that this must not be considered a precedent for any departure from the rules in future. *In re BECKWITH*,194

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A bill of sale absolute on its face, was made subject to a defeasance or equity of redemption, but the defeasance was not filed under the Bills of Sale Act.

Held, that the bill of sale was inoperative, and vested no title in the grantee as against the assignee of the grantor under the Insolvent Act.

A bill of sale professed to convey all the goods and merchandise of the grantors, contained in their store, situate, etc., consisting of dry goods and groceries mentioned in the schedule annexed. There was no schedule.

Quære: per ALLEN, C. J., whether the bill of sale was not thereby inoperative. *In re DEVEBER*: *Ex parte DEVEBER*,397

2—*Matters of Insolvency—Ultra Vires—Assignment of debts—Registry—Future Advances—Fraudulent preference—Banking Act 34 Vic., c. 5, s. 40.* D. & Co., merchants, kept a banking account with the Bank of New Brunswick, and by deposit of collateral security were allowed to overdraw their account to the extent of about \$20,000, up to September, 1879, when the bank refused further advances without additional security. D. & Co. requiring a further advance of \$40,000 to enable them to carry on their business, without any specific arrangement with the bank, executed a bill of sale on the 17th September, whereby in consideration of the sum of \$40,000 alleged to be paid to them, they conveyed to the bank all their goods and stock in trade, and all book accounts due and owing to them, as security for the payment of the \$40,000. This bill of sale was given by D. & Co. to the President of the Bank, who informed the bank Directors of it; but it did not appear that it was laid before the board, or that they approved of it, or agreed to advance the \$40,000 to D. & Co., or that any subsequent communication was made to D. & Co. respecting it; but the bank discounted notes for them, the proceeds of which were placed to their credit, and they continued to draw on the bank—their over-drawn account being increased by about \$19,000 at the time of their insolvency. The bill of sale was not registered until the 5th November, and on the 22nd November, D. & Co. went into insolvency, having suspended payment on the 3rd November.

Held, per ALLEN, C. J., WETMORE, DUFF, and PALMER, J.J. 1. That the Bills of Sale Act was not *ultra vires*, as dealing with matters of insolvency.

2. Per ALLEN, C. J., WETMORE and DUFF, J.J. That so far as related to the goods of the insolvents, the bill of sale only took effect from the time of registry, which, being with-

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in thirty days of D. & Co.'s assignment, was *prima facie* invalid under section 133 of the Insolvent Act of 1875.

3. That the Bills of Sale Act only applied to personal chattels, and not to debts or choses in action, and therefore the non-registry of it would not affect the transfer of the debts; but

4. As the bank never agreed to accept the proposed security or advance the \$40,000 to D. & Co., the debts did not vest in the bank under the bill of sale, but passed to the assignee of the insolvent.

Per PALMER, J. 1. That as the bill of sale was of no effect till registry, it was *prima facie* void both as to the goods and debts, under section 133 of the Insolvent Act, as having been made in contemplation of insolvency.

2. That if the bill of sale had been registered at the time it was given to the bank it would have been void under the Insolvent Act, it having been a transfer of all the insolvent's property, and given in contemplation of insolvency, and with intent to prefer the bank over the other creditors.

Per WELDON, J. 1. That the case was not affected by the Bills of Sale Act.

2. That the bill of sale was binding on the insolvents from the time of its delivery to the bank, and not merely from its registry; that it gave the bank a lien on the property, which vested in the assignee subject to such lien.

3. That there was no evidence that it was given in contemplation of insolvency.

4. That there was an agreement by the bank to make advances to D. & Co. under the bill of sale.

5. That as there was a debt due the bank when the bill of sale was given, it was not invalid under the Banking Act, 34 Vic. c. 5, s. 40. *In re DEVEBER*: *Ex parte BANK OF NEW BRUNSWICK*,401

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CANADA TEMPERANCE ACT, 1878—*City within meaning of—Licenses—Expiration of.* The Town of Moncton, in the County of Westmorland, was incorporated by Act of Assembly, whereby the whole local government of the town, and the exclusive power to grant licenses for, and to regulate the sale of spirituous liquors in the town, was vested in the

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Town Council. The County of Westmorland was afterwards incorporated as a Municipality. "The Canada Temperance Act, 1878" provided that the proceedings for bringing the Act into force in any county or city should be by petition to the Governor General of at least one-fourth of the electors of any county or city, on which a proclamation might issue for taking a poll of the votes for and against the petition. By section 96, if the petition was adopted by the electors of the county or city named therein, and to which the same related, the Governor General in Council might by order in Council declare "That the Act shall be in force and take effect in such county or city, from and after the day on which the annual or semi-annual licences for the sale of spirituous liquors then in force in such county or city will expire." A petition from the requisite number of electors in the County of Westmorland having been presented to the Governor General, and a vote having been taken adopting the petition, an order in Council was made, declaring that the Act should be in force and take effect in the County of Westmorland from and after the day on which the annual or semi-annual licences for the sale of liquors then in force in the said county expired. At the time this order in Council issued, there were licences for the sale of liquors in force in Moncton, granted by the Town Council, and in the County of Westmorland, granted by the Municipality, such licences expiring at different periods.

Held, by ALLEN, C. J., and DUFF, J. (KING, J., dissenting), that Moncton is a city within the meaning of the Canada Temperance Act, and as no separate vote of the ratepayers of the town had been taken, the order in Council bringing the Act in force in the County did not apply to Moncton. *Held* per KING, J., that Moncton is not a city within the meaning of the Act and that the Act came in force in the County, including Moncton, on the termination of the latest expiring licences either in the town or county.

The licences granted by the Town Council of Moncton expired on the 15th December, 1880. A bye-law of the Municipality declared that all tavern licences should expire at the annual meeting of the Council, which was the third Tuesday in January. Licences were granted by the Municipality on the 24th Jan. 1880, for one year.

Held, per WELDON and WETMORE, JJ., that even if the Act were in force in Moncton, such licences would not expire till the 24th January, 1881, and that the Canada Temperance Act would not be in force in Moncton till that day. Per KING, J., that the licences

CANADA TEMPERANCE ACT.—Continued.

should be read in connection with the bye-law, and that they would not run for 365 days from their issue, but would expire at the annual meeting of the Municipality (the 18th January, 1881), and therefore a conviction for selling liquor in Moncton on the 23rd January was sustainable. *Ex parte McCleave*,... 315

2—*Certiorari*—*In what cases taken away*—*Sec. 111—Construction of—Penalties under sec. 110—How recoverable*. *Held* per ALLEN, C. J., DUFF and KING, JJ., (WELDON, WETMORE and PALMER, JJ., dissenting), that by section 111 of the Canada Temperance Act a *certiorari* is taken away in all cases of conviction for offences against Part II. of the Act, except where there is an excess or want of jurisdiction.

Per WETMORE and PALMER, JJ., that the *certiorari* is not taken away where the conviction is before two Justices of the Peace, but only where it is before the officers named in sec. 111.

2. Per ALLEN, C. J., WETMORE, DUFF, PALMER and KING, JJ., that the convictions, &c., mentioned in sec. 111 related to offences against Part II. of the Act, and not to the offences created by sec. 110.

3. Per ALLEN, C. J., DUFF and PALMER, JJ., that the Penalties for offences under sec. 110 were not recoverable by summary conviction, but by action of debt.

4. Per ALLEN, C. J., DUFF and KING, JJ., that as a *certiorari* would still lie in some cases, *e. g.* excess or want of jurisdiction, &c., the recognition of the *certiorari* in sec. 118 was not inconsistent with the prohibitory words of sec. 111.

5. Per WETMORE and PALMER, JJ., that as the *certiorari* was not taken away by sec. 111 where the conviction was before two Justices of the Peace, the 118th section might apply to such cases. *Ex parte HACKETT*,... 513

CERTIFICATE—Under 37 Vic. c. 94, Act of Parliament—Shareholder of Company,... 309

See EVIDENCE, 4.

CERTIFICATE FOR COSTS—In action in Supreme Court for trespass—Title to land not brought in question—Verdict less than \$100,... 1

See COSTS, 1.

CERTIORARI—*Judge Supreme Court—Review—New trial*. A *certiorari* will not be granted to bring up the proceedings in review before a Judge of this Court, under the Consol. Statutes, c. 60, the proper remedy being by motion to set aside the order. (WETMORE, J., dissenting.)

A Judge has no power to order a new trial

CERTIORARI.—*Continued.*

in a review case, under Consol. Stat. c. 60, s. 43. (WELDON and PALMER, JJ., dissenting.)
Ex parte KANE, 370

2—*Consol. Stat. c. 60, s. 45*—*New trial in review under—County Court Judge*. A *Certiorari* will lie to bring up the proceedings in review had before a County Court Judge under Consol. Statutes, c. 60 if he had no jurisdiction to make the order (WELDON, J., dissenting).

Per WELDON, J. The order of a Judge in a review case is final.

A Judge has no power to order a new trial in a review case under Consol. Stat. c. 60, s. 45 (WELDON and WETMORE, JJ., dissenting).
Ex parte FAHEY, 392

—Canada Temperance Act—In what cases taken away, 513
 See CANADA TEMPERANCE ACT. 2.

CHARTER-PARTY.—*Damage to ship—Unavoidable delay—Refusal of charterers to load—Action by ship-owners for*. By a charter-party of December 11, 1878, it was agreed that the plaintiff's vessel, then on her way to Shelburne, N. S., should proceed with all possible despatch after her arrival at Shelburne to St. John, and there load from the charterers a cargo of deals for Liverpool; and if the vessel did not arrive at Shelburne on or before 1st of January, 1879, the charterers were to be at liberty to cancel the charter-party. The vessel arrived at Shelburne in December, and sailed at once for St. John. At the entrance of the Harbor of St. John she got upon the rocks, and was so badly damaged that it became necessary to put her upon the blocks for repairs. Although she was repaired with all possible despatch, she was not ready to receive her cargo until 21st April following; prior to which time—on 26th March—the charterers gave the owners notice that they would not furnish a cargo for her. The owners sued for breach of the charter-party, and on the trial defendants gave evidence, subject to objection, that freights between St. John and Liverpool were usually much higher in winter than in summer, that lumber would depreciate in value by being wintered over at St. John, and also as to the relative value of lumber during the winter and in the spring in the Liverpool market; and it was contended that the time occupied in repairing the damage was unreasonable and had entirely frustrated the object of the voyage. The Judge directed the jury that if the time occupied in getting the vessel off the rocks and repairing her, was so long as to put an end, in a commercial sense, to the commercial speculation entered into by

CHARTER-PARTY.—*Continued.*

the ship owners and charterers, they should find for the defendants. The verdict being for the defendant,

Held, on motion for a new trial, that this was a misdirection, there being no evidence to warrant the case being left in this way, and a new trial was ordered. *SCHOFIELD v. CARVILL*, 558

CHOSE IN ACTION.—Bills of Sale Act does not apply to, 401

See BILLS OF SALE ACT. 2.

CITY.—Within meaning of Canada Temperance Act, 1878, 315

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COMMISSION.—Depositions taken under—Sufficiency of endorsement on envelope enclosing, 273

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CONDITIONAL SALE.—Lease—Monthly rent—Not Bill of Sale, 480

See CONTRACT. 3.

CONFESSION.—Given by one partner for himself and his co-partner with his consent—Effect of, 277

See EXECUTION.

CONSIDERATION.—What sufficient averment of, to support written agreement, 11

See AGREEMENT.

—Illegal in part—Lease, 339

See RAILWAY COMPANY. 1.

CONTRACT.—Void—A contract was made on the 26th September to erect a proper and legal building in the City of Saint John. Two days afterwards a bye-law of the city was passed prohibiting the erection of buildings such as the one contracted for and declaring them to be nuisances.

Held, per WELDON, J., that the bye-law avoided the contract, and a building erected under it was a nuisance. Per WETMORE, J., that even if the bye-law did make the building a nuisance, the plaintiff could not, under the pleadings in the case, have the benefit of it. *McMILLAN v. WALKER*, 31

2—*Parties to—Policy of Insurance—Beneficiary not entitled to bring action in her own name*. By a policy of insurance on the life of the husband, effected by him for the benefit of the plaintiff, his wife, the defendant company agreed to pay the sum assured to the plaintiff, or her executors, administrators, or assigns, and in the case of her death in his lifetime, to his executors, administrators, and assigns. By his application for the insur-

CONTRACT.—*Continued.*

ance the husband agreed that his answers to certain questions should form the basis of the contract, and he agreed to pay the premiums.

Held, (by ALLEN, C. J., WETMORE, DUFF, and KING, JJ., WELDON, J., dissenting), that the plaintiff could not maintain an action on the policy in her own name. *ABBINETT v. NORTH WESTERN MUTUAL LIFE INS. CO.*, 216

3—*Written—Fraudulent misrepresentation*⁸—*Tender—Consol. Statutes, c. 75—Bill of Sale under.*] A. being in treaty with the plaintiffs for the purchase of a sewing machine, signed an agreement stating that he had received the machine of the value of \$65, which the plaintiffs had leased to him for nine months at the rent of \$6 per month, \$15 being paid in advance at that time; that he would take care of the machine, and not part with the possession of it; and in case he made default in paying the rent or in the performance of the agreement, that the plaintiffs might take possession of the machine, and he would forfeit any rent paid: and the plaintiffs agreed if A. paid the rent, they would sell the machine to him for one cent at the expiration of the nine months. A. having made default in paying the monthly rent, the plaintiffs demanded the machine, which was in possession of the defendant under a bill of sale from A: defendant refused to give it up, but afterwards, and before action brought, tendered the plaintiffs \$14, the balance of the \$65 unpaid. In trover for the machine, A. swore that there was a verbal sale of the machine to him for \$65, of which he paid \$15 at the time; that he did not read the agreement and the plaintiffs' agent told him at the time he signed it that it was an agreement to secure the balance of the purchase money by monthly instalments. The jury having found a verdict for the defendant on a question left to them whether the plaintiffs' agent had fraudulently represented to A. the contents of the written agreement.

Held, per WELDON, WETMORE, PALMER and KING, JJ., (ALLEN, C. J., *dubitante*), that if there was fraudulent misrepresentation respecting the writing, the property in the machine passed to A. under the verbal agreement, and he had a right to transfer it to the defendant.

Per WELDON, PALMER and KING, JJ., that even if the property did not vest in A. till the whole price was paid, the tender of the \$14 before action would prevent the plaintiff from recovering.

Per ALLEN, C. J., that the evidence of misrepresentation of the contents of the writing was unsatisfactory.

CONTRACT.—*Continued.*

Per ALLEN, C. J. and WETMORE, J., that if the property in the machine did not vest in A. till the whole price was paid there was a wrongful conversion by the defendant, which would not be affected by the subsequent tender of the balance of the purchase money.

An agreement for a conditional sale of a chattel, with the lease of it in the meantime at a monthly rent, is not a bill of sale under Consol. Stat., c. 65. *WHEELER & WILSON MANUFACTURING CO. v. CHARTERS*, 480

CONVERSION—*Of goods—Waiver of tort—Action for goods sold and delivered—Money had and received—Particulars of demand.*] Plaintiffs and defendant negotiating about the sale of lumber, they wrote to him offering to sell at a certain price. Before the receipt of this letter, the defendant's servants, without his knowledge, shipped the merchantable part of the lumber. In answer to the letter the defendant offered to give the price asked for so much of the lumber as was merchantable, and a lesser price for the rest, which offer the plaintiffs refused. The defendant admitted that he had got returns for the lumber shipped. In an action for goods sold and delivered and also for money had and received:

Held, That an action for goods sold and delivered would not lie.

The plaintiffs' particulars claimed for a quantity of lumber at a certain price, but made no reference to either of the counts of the declaration:—

Held, Sufficient to entitle the plaintiffs to claim under the count for money had and received, as they gave the defendant substantial information of the plaintiffs' demand. *FLEWELLING v. LAWRENCE*, 529

—What constitutes when property held subject to a lien for charges, 124

See TROVER. 1.

COSTS—*Certificate for—Where action is in this Court, and jury find less than \$100—Title to land not brought in question—Certificate granted.*] The defendant having leave to cut lumber on land adjoining the plaintiff's, was warned by the plaintiff to be careful that he did not cut on his land. The defendant paid no attention to the warning, and took no trouble to ascertain where the line was, but told his men to continue cutting, saying that he would make it all right. In an action brought for the trespass, the defendant did not question the plaintiff's title. The plaintiff recovered less than \$100. The Chief Justice granted the plaintiff a certificate for costs.

COSTS.—Continued.

Held, (by ALLEN, C. J., and WELDON and DUFF, JJ., WETMORE and KING, JJ., dissenting), that the certificate was rightly granted. *CORMIER v. MCKEE*, 1

2—The Equity Court granted the appellant costs out of the estate, but directed the clerk not to tax them until she had withdrawn her opposition to the payment of certain moneys of the estate to the executors in this Province by the executor in the State of New York. It appeared in evidence that by the laws of New York the executor there could not part with the estate until the expiration of eighteen months after the will was proved in that State. This period had not expired at the time when the appellant served the notice on the executor forbidding his parting with the estate or at the time when the decree was made, but had, at the time judgment was given on appeal.

Held, That the direction as to costs was not a ground of appeal even though this Court might not have come to the same conclusion as the Judge of the Court below. *MERRITT v. WRIGHT*, 135

3—*Of the day—Affidavit not disclosing that cause was at issue—Where cause had been noticed for trial and entered at the circuit—Court will presume cause was at issue.*] The plaintiff gave notice of trial and entered the cause on the docket at the circuit. An application to set aside a rule for costs of the day for not proceeding to trial was made on the ground that the affidavit on which the rule for costs was obtained did not shew that the cause was at issue.

Held, That as against the plaintiff the Court must presume that the cause was at issue. *MCCARTHY, ADM., v. PROVIDENCE WASHINGTON INS. CO.*, 165

4—*Certificate for—Where Judge, who tried cause, dies before giving certificate.*] Where the Judge who tried a cause has died without giving the plaintiff a certificate for costs, he is without remedy, as another Judge cannot grant the certificate. *NICHOLSON v. TEMPLE*, 192

5—*Taxation of—On a day other than that appointed for taxation—Review of taxation.*] When it appeared that the clerk, by his appointment to tax costs obtained by the plaintiff, appointed the 8th as the day for the taxation, and the costs were not taxed until the 10th, and it did not appear that the defendant was represented at the taxation, and no explanation was given of the taxation taking place on a day later than that appointed, the Court made absolute a rule to review the taxation. *MACLELLAN v. BARNES*, 226

COSTS.—Continued.

6—*Of making cause a remanet part of the general costs in the cause—Affidavit for taxation of witness fees—Sufficiency of—Cost of writing letters to each of the several defendants—Whether taxable—Costs of discharging rule where point raised is new.*] Where in an action of trespass one of several defendants offered, under Consol. Stat. c. 37, s. 127, to suffer judgment by default for \$50, and the plaintiff recovered against all the defendants for that sum (\$50) it was *held* that the plaintiff was entitled to costs against all the defendants.

The cause had been made a remanet at the Circuit preceding that at which it was tried. A new trial was granted on payment of costs. On the second trial the plaintiff again had a verdict.

Held, that the plaintiff was entitled to the costs of making the cause a remanet as part of the general costs in the cause.

The affidavit of the attendance of witnesses stated that a paper annexed "was a statement of the number of the witnesses who attended for the plaintiff on the trial of the cause, the number of days each one attended, and the number of miles each travelled, and that the plaintiff believed they were material and necessary witnesses."

Held, sufficient, (ALLEN, C. J., doubting).

Semble. That the plaintiff is entitled to the costs of sending a letter to each of several defendants.

The point raised being new, the rule was discharged without costs, (WETMORE and PALMER, JJ., dissenting). *GAGNON v. CHAPMAN*, 251

—On motion to dismiss appeal from County Court, refused, 272

See APPEAL. 5.

—Refused on application to amend rule, 302

See AMENDMENT.

COUNSEL—When defendants appear by same Attorney and are represented by separate Counsel—Whether both Counsel have right to cross-examine witnesses and address the jury, 31

See PRACTICE. 1.

COUNTY COURT—Power to give costs, 272

See APPEAL. 5.

COUPONS—Interest on is not recoverable, 200

See DEBENTURES.

COURT, GENERAL RULE OF—*Michaelmas Term 45 Vic.—Admission of Barristers.*] 1. Whenever any attorney of this Court shall de-

COURT, GENERAL RULE OF.—*Continued.*

sire to be called to the Bar as a barrister, he shall apply by petition to the Court, stating the date of his admission as an attorney; which petition shall be filed with the clerk on or before the first day of the term in which he intends to apply.

2. Thursday in the first week and Thursday in the third week of each term, at the opening of the Court on such days, shall be times for the admission of barristers, and no attorney shall be admitted to the Bar at any other time unless it shall be shewn by affidavit to the satisfaction of the Court that the person so applying was prevented by reasonable cause from being present at the time appointed, 312

CRIMINAL LAW—Acts of Canada 32 & 33 Vic. c. 21—Larceny of an unstamped promissory note—Whether "valuable security" within the meaning of the Act.] *Held*, (by ALLEN, C. J., DUFF and KING, JJ., WELDON and WETMORE, JJ., dissenting), that an insufficiently or defectively stamped promissory note, the holder being ignorant of the insufficiency of, or defect in, the stamping, may be the subject of larceny, as a valuable security, under the Act 32 & 33 Vic. c. 21, s. 15. *REGINA v. DEWITT*, 17

2—*Jury—Separation of, during trial—What sufficient to avoid verdict—Order under cap. 41 Consol. Statutes—Court can inquire into facts although return shows prisoner to be properly in custody.]* The prisoner was tried before the York County Court on a charge of larceny and found guilty. During the trial the jury, while in charge of two constables, were allowed to separate by walking on different sides of the street. One or two other separations of a similar nature were complained of, but there was nothing to shew that any of them had any conversation with any person not a juror in reference to the case. This was brought to the notice of the County Court Judge, and an application was made to him to delay passing sentence, and to treat the verdict as a nullity. This application was refused, and the prisoner was sentenced and remanded to gaol, pending his removal to the penitentiary. An order to the keeper of the gaol having been obtained under the provisions of cap. 41 of the Consol. Statutes upon the return of this order.

Held, (by ALLEN, C. J., WETMORE, DUFF and PALMER, JJ., WELDON and KING, JJ., dissenting), that the separation of the jury was such as to avoid the verdict.

Held, (by ALLEN, C. J., WETMORE, DUFF and PALMER, JJ., WELDON and KING, JJ., dissenting), that, although the return of the

CRIMINAL LAW.—*Continued.*

gaoler shewed that the prisoner was properly in custody under the sentence of a Court of competent jurisdiction, the Court has power to inquire into the facts of the case, and that the prisoner is not bound to proceed by a writ of error. *Ex parte Ross*, 257

3—*Indictment—Misjoinder of counts—Evidence—Amending reserved case].* An indictment contained two counts, one charging the prisoner with murdering M. J. T. on the 10th November, 1881; the other with manslaughter of the said M. J. T. on the same day. The Grand Jury found "a true bill." A motion to quash the indictment for misjoinder was refused, the counsel for the prosecution electing to proceed on the first count only.

Held (PALMER, J., dissenting) that the indictment was sufficient.

The prisoner was convicted of manslaughter in killing his wife, who died on the 10th November, 1881. The immediate cause of her death was acute inflammation of the liver, which the medical testimony proved might be occasioned by a blow or a fall against a hard substance. About three weeks before her death the prisoner had knocked his wife down with a bottle; she fell against a door, and remained on the floor insensible for some time; she was confined to her bed soon afterwards and never recovered. Evidence was given of frequent acts of violence committed by the prisoner upon his wife within a year of her death, by knocking her down and kicking her in the side.

Held per ALLEN, C. J., WELDON, WETMORE, DUFF and KING, JJ., (PALMER, J., dissenting), that there was evidence to leave to the jury that the disease which caused her death was produced by the injuries inflicted by the prisoner, and that the evidence of violence committed within a year of the death was properly received.

Where it was objected at the trial that there was not evidence against the prisoner to leave to the jury, but the Judge was not asked to reserve the point, the case reserved was allowed to be amended at the argument, in order to raise the point. (WELDON and WETMORE, JJ., dissenting.) *REGINA v. THEAL*, 449

DEBENTURES—Issued under 38 Vic., c. 85—In hands of third parties—Coupons—Interest on.] *Held*, adhering to the opinion expressed in this case in 4 P. & B. 78, that Debentures issued under 38 Vic. c. 85, sealed with the seal of the General Sessions of the County of Albert, acquired by the 4th section of the Act, a negotiable character like promissory notes payable to bearer, and that

DEBENTURES.—*Continued.*

in the hands of third parties, their validity could not be questioned.

Interest on coupons is not recoverable.
JONES v. MUNICIPALITY OF ALBERT, 200

DEBTS—Bills of Sale Act does not apply to, 401

See **BILLS OF SALE ACT**. 2.

DECREE—Of Equity Court—Parties assenting to must be bound by it, 135
• See **WILL**. 2.

DEED—By infant—Evidence of confirmation after coming of age, 119
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—Effect of words "Warrant and defend," 549
See **ESTOPPEL**. 2.

DEFESANCE—Bill of Sale subject to—not filed—Bill of Sale inoperative, 397
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DELAY—Unavoidable—When charterers relieved, 558
See **CHARTER-PARTY**.

DEMURRER—On ground that the declaration does not disclose any consideration for the making of the promises therein alleged, . . . 11
See **AGREEMENT**.

DEPOSITIONS—*Endorsement on envelope enclosing—What sufficient entitling of cause—Consol. Stat. c. 37, s. 194*] The parties to the action were *La Banque Ville Marie*, plaintiff, and *Albert J. Lordly* and *Sterling B. Lordly*, defendants. The depositions taken under a commission were returned addressed to the Court, and endorsed *La Banque Ville Marie v. A. J. Lordly, et al.*

Held, that the endorsement was not sufficient. *LA BANQUE VILLE MARIE v. LORDLY*, 273

DISCHARGE—Of prisoner in custody under warrant of commitment made by a magistrate, 221
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EQUITY—When decision of Judge in Equity on a question of fact will be reversed on appeal, 4

See **APPEAL**. 1.

EQUITY APPEAL PAPERS—When to be printed, 489

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EQUITY COURT—*General Rule of—Easter Term, 44th Vic.*] 1. It is Ordered, That where leave is given to introduce facts and circumstances into a Bill filed, by way of amendment, or, where the plaintiff has liberty to state such circumstances on the Record, pursuant to the provisions of the 56th section of chapter 49 of The Consolidated Statutes, such amendment or statement shall be made by filing with the clerk a printed or written statement thereof, to be annexed to the bill; and such proceedings by way of answer, evidence, or otherwise, shall be had and taken thereon, as if the same were embodied in a Supplemental Bill: provided that the Judge may make such order for accelerating the proceedings as may be agreeable to justice.

2. Whenever a Judge receives notice of Appeal under the 61st section of chapter 49 of The Consolidated Statutes, he shall, on the application of either party, order that the same be set down for hearing at the Term of the Supreme Court next after such application, and the clerk shall thereupon enter the same upon the proper paper, and the same shall be heard when reached; and if not then prosecuted, such appeal shall be dismissed with costs, unless the Court shall upon good cause shewn postpone the hearing of such appeal, 166

ESTATE—Claims against need not be sworn to before action, 102

See **EXECUTORS**.

ESTOPPEL—*Admissions by an infant—Appeal—On questions of fact—Jones v. Calkin, and Hilland v. Hamm*]. In a Court of Equity an infant stands in no different position from a person of full age in relation to matters of fraud, and therefore if he makes a representation upon which another person acts he will not be allowed to impeach the validity of it on the ground of his minority. *WILBUR v. JONES*, 4

2—Words "Warrant and defend"—Effect of in Deed]. D. while residing on crown land and after he had applied for a grant under

ESTOPPEL.—Continued.

the Labor Act, conveyed it by a warranty deed to S., who afterwards conveyed to the defendant. D., after obtaining the grant, conveyed the land in question to B., who conveyed to the plaintiff. It appeared on the trial that both B. and the plaintiff had notice of the deed to S. before the deeds were given to them respectively.

Held, That D. was estopped from denying that he had title to the land when he made the conveyance to S., and that the plaintiff, claiming under him as his assignee, was bound by the same estoppel, which runs with the land.

Held, also, that the words "warrant and defend" are words creating a covenant of warranty. *GUEGAIN v. LANGIS*, 549

EVIDENCE—The defendants, under the item "expenses of administration," in the notice given with the plea of *plene administravit*, under Consol. Stat. cap. 52, sec. 21, offered evidence of the probable expenses of this and other suits.

Held, that the evidence was properly refused. *MARSHALL v. ARMSTRONG*, 102

2—*Slander—Husband and wife—Action for words of wife—What witness understood words to mean—Evidence—Damages*. In an action of slander a witness cannot be asked what he understood to have been meant by the words used unless it is first shewn that there was something to prevent the words from conveying the meaning they would ordinarily convey. Per *WELDON and WETMORE, JJ.*

In any case the question would be improper if asked the plaintiff, for if the words used required a peculiar meaning to be given them to make them actionable, others than the plaintiff must have understood them to have been used in a peculiar sense, or there would be no publication. Per *WETMORE, J.*

In an action of slander against a husband and wife for the slander of the wife, evidence of a statement of the wife made subsequent to the slander, that her husband compelled her to utter it, and his object in compelling her, is improper. Per *WELDON, J.* *WOOD v. MACKAY AND WIFE*, 109

3—*Certificate under 37th Vic. c. 94, Acts of Parliament—Necessity of shewing defendant to be a shareholder before certificate is evidence against him*. By the fifth section of the Act incorporating the Stadacona Fire and Life Insurance Company, it is provided that in an action against a shareholder for calls, a certificate, under the seal of the company, and purporting to be signed by one of their officers, to the effect that the defendant is a shareholder, that such calls have been made,

EVIDENCE.—Continued.

and that so much is due by him, shall be received in all courts of law as *prima facie* evidence to that effect. The certificate put in evidence on the trial certified that defendant was the holder of fifty shares, that certain calls had been made, and that he was indebted to the company in a sum named, being the amount of the calls.

Held, that the certificate was not evidence against the defendant, in the absence of other evidence that the defendant was a shareholder in the company. *STADACONA INS. Co. v. RAINSFORD*, 309

—Leave and License, 304

See *SHERIFF'S SALE*.

—Mere omission to disaffirm a conveyance made by infant after coming of age is not sufficient evidence to warrant a jury in finding a confirmation, 119

See *INFANT*.

EXECUTION—*Priority lost by instructions to sheriff—Confession signed by one partner for himself and his co-partner—With co-partner's consent—One partner acknowledging service of summons for himself and co-partner with latter's consent—Summons filed without affidavit of service—Irregularities—Third parties cannot take advantage of, in absence of fraud—Confession signed May 2nd, authorizing judgment to be signed on "the fifth day of May next"—When due.] Where an execution was placed in the sheriff's hands with instructions to make a *pro forma* levy, but not to advertise and sell, or do anything more until he received further instructions, it was held by *ALLEN, C. J.*, and *PALMER and KING, JJ.*, that the execution was not delivered to be executed within the meaning of the Statute of Frauds (Consol. Stat. c. 76, s. 11), and therefore did not bind the goods of the defendants; but by *WELDON and WETMORE, JJ.*, that the direction to the sheriff not to proceed to advertise and sell until further orders, was not such an interference with the execution as would give subsequent executions priority.*

R. & B., co-partners, were indebted to A.: B. being about to go away consented that a confession should be given to A., and authorized R. to sign his name in his absence. R. accordingly signed B's name to the confession, and afterwards, on B's return, informed him of what he had done, to which B. replied, "that is all right."

Held, (by *ALLEN, C. J.*, and *WELDON and WETMORE, JJ.*, *PALMER, J.*, dissenting), that this was a sufficient recognition of the confession to prevent B. from objecting to it, and certainly sufficient to prevent any one else from taking a similar objection.

EXECUTION.—*Continued.*

R. for himself and B. acknowledged service of the writ of summons, which was filed. No affidavit of service was made, no appearance was entered, and no declaration was filed; judgment was entered up on a confession signed by R. for himself and B., with B's consent, the judgment roll being duly filed. The judgment creditor was R's father, and the proceedings were in the nature of a friendly arrangement.

Held, (by ALLEN, C. J., and WELDON and WETMORE, J.), PALMER, J., dissenting, that these were matters of irregularity only, of which subsequent judgment creditors could not take advantage, in the absence of fraud.

Held, by KING, J., that although there was no evidence of actual fraud, the proceedings by the preferred creditor against the preferring debtors amounted to an abuse of the process of the Court, and that the judgment ought to be set aside unless the plaintiff so amended his proceedings as to bring them into uniformity with the practice of the Court.

Where judgment is entered up for more than is due from the defendant to the plaintiff, the Court will, on the application of a subsequent judgment creditor of the defendant, reduce the amount of the judgment: by ALLEN, C. J., and WELDON and WETMORE, J.J.

Where a confession dated the 2nd day of May, 1881, authorized judgment to be signed on "the fifth day of May next," it was held by ALLEN, C. J., and PALMER, J., that this meant the fifth day of May, 1882; but by WELDON and WETMORE, J.J., that as it was evident the parties meant the fifth day of May instant, and the error was clerical, the plaintiff was entitled to sign his judgment on the 5th of May, 1881. This objection not being taken before the Judge who referred the matter to the Court, ALLEN, C. J., was of opinion it ought not to prevail. *RECORD v. RECORD*,.....277

EXECUTORS—*Claim against estate—Need not be sworn to before action—Consol. Stat., cap. 52, sec. 19.* By Consol. Stat., cap. 52, sec. 19, it is provided that no debt shall be paid by an executor until the same be certified by affidavit.

Held, that the obtaining of the affidavit was not a condition precedent to the right to sue for the debt, and if it were, to be available as a defence, it would have to be specially pleaded. *MARSHALL v. ARMSTRONG*,.....102

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HABEAS CORPUS—*Practice—Affidavit—Surplusage*]. It is not a ground for setting aside a writ of *Habeas Corpus* that affidavits on which the fiat for the writ was granted were intitled "In the Supreme Court, *ex parte*," &c., the words after "Supreme Court" being mere surplusage.

Where a Judge granted a fiat for a writ of *Habeas Corpus* against two persons, to bring up the bodies of two infant children, the Court would not set aside the writ merely on the ground that it did not clearly appear from the affidavits that they were in the custody of both.

It is not a ground for setting aside a writ of *Habeas Corpus* that two original writs were issued exactly alike, though such a proceeding was quite unnecessary. The fiat being endorsed on the writ and signed by the Judge is sufficient. It is not necessary for him also to sign the writ.

The writ of *Habeas Corpus* issues by common law, except in cases of imprisonment on charges of crime, to which only, the Stat. 31 Charles II. applies. *In re SHAUGHNESSY*,.....182

HEIRS—Construed same as "children" or "issue" when such was clear intention of testator,.....169

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INFANT—*Conveyance of land by—Confirmation after coming of age—Evidence*]. A conveyance of land by an infant is voidable only and may be avoided by him after coming of age.

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Mere omission to disaffirm such a deed is not sufficient evidence to warrant a jury in finding a confirmation. *Doe dem. SEELY v. CHARLTON*,.....119

—**Fraud**—In a Court of Equity an infant stands in no different position from a person of full age in relation to matters of fraud, . . 4

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INSOLVENT ACT—*When one partner purchases from Assignee estate of Insolvent firm, en bloc—Right to sue for debts due firm in his own name—Payment—What constitutes—Where money received by person being partner in two firms*. G. & L. were merchants doing business in S, the firm being composed of the respondent and W. S. L. The latter was also a member of the firm of S. L. Son & Co., also doing business in S. The latter firm was composed of W. S. L. and one of the appellants, S. L. The appellants were owners of the brigantine "Flora," of which S. L. was registered as managing owner. G. & L. by direction of the managing owner, gave supplies to the vessel, and were to be repaid out of the freight to be earned on her then intended voyage. Subsequently, on Nov. 18, 1878, G. & L. were put into insolvency, under the Insolvent Act of 1875. The respondent obtained from his individual and co-partnership creditors a discharge, and the assignee duly executed to him a transfer of the whole estate.

Respondent then brought a suit, in his own name, as purchaser of the estate, in the County Court, against appellant as owners of the vessel, for recovery of the price of the supplies furnished.

Held, (1.) That the respondent had rightly brought the action in his own name, (2.) That the fact of S. L. Son & Co., of which firm W. S. L. was a member, having received the freight would not affect plaintiff's right to recover for the supplies. *LEONARD v. GRIFFIN*,188

INSURANCE—*Marine—Loss or damage—Limitation of time within which to bring action for recovery of—Condition—Pleading*. A policy of marine insurance provided that all losses and damages which should happen, should be adjusted and paid in sixty days after proof of loss and adjustment; and that no suit or action against the company for the recovery of any claim under the policy should be sustainable unless such suit or action be commenced within twelve months next after any loss or damage occurred. In an action on the policy, the defendants pleaded that the loss or damage to the vessel did not occur within twelve months before the commence-

INSURANCE.—*Continued.*

ment of the action. Replication—that the loss, without the plaintiff's fault, was not adjusted till a certain day, and that the action was brought within twelve months thereafter.

Held—on demurrer—that the plea stated a good defence, and that the replication was no answer to it. *DICKIE v. THE WESTERN ASS. Co.*,.....544

2—**Fire—Conditions—Waiver**. In an action on a policy of insurance for damage to the appellant's house by fire no evidence was given that the preliminary proof required by the policy had been furnished. The only dispute being the amount of damage, the appellant relied upon the fact that the sub-agent had had the damage estimated and that he consented to accept the estimate, as a waiver. The 19th condition declared that none of the conditions in the policy should be taken as waived by the Company unless the waiver was endorsed on the policy and signed by the agent at St. John.

Held on appeal (*KING, J., dubitante*), that the Court below was right in ordering a nonsuit to be entered on the ground that there was no evidence of a waiver of the preliminary proof. *McKEAN v. COMMERCIAL UNION INS. Co.*,.....583

—**As to right of Trustees of estate under will to insure new buildings or increase the insurance when directed to insure in about the amount in which testator insured**, . . .135

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IRREGULARITY—*In entering up judgment on confession*,277

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JUDGE'S ORDER—*Discharging a person in custody under a warrant of a magistrate—Made ex parte in a summary way—No lawful authority for making such order*.] *Held*, (by *WETMORE, DUFF, PALMER* and *KING, J.J.*, *WELDON, J.*, dissenting), that a Judge of the Court has no power on the application of one in custody, under a warrant of commitment made by a magistrate in due form of law, to make an *ex parte* order, in a summary way,

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for the prisoner's discharge. The prisoner must proceed by writ of *habeas corpus* or by proceedings under cap. 41 of the Consolidated Statutes. *Ex parte* WOODWARD,221

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—An agreement for a conditional sale of chattels under a lease, not bill of sale,480

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LIEN—Persons entitled to hold goods for—Refusal to deliver until other charges were paid—Waiver,124

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MARKET—*Public*—Grant of public market place—Whether authorizes establishment of market—11 Vic. 61, 14 Vic. c. 15, 22 Vic. c. 8, 30 Vic. c. 37 considered—Whether York County Council or City Council of Fredericton have control of the Queen's Ward Market—Imposing tolls or closing market without express authority—*Repeal of Acts.*] The grant of a piece of land for a public market place authorizes the grantee to establish a market there.

Prior to 1848 the title to the market house in Queen's Ward, in the City of Fredericton, was in the Justices of York County, who had

MARKET.—*Continued.*

power to make regulations for the management of the market. By 11 Vic. c. 61, s. 40, all power which the Justices of York had to make regulations upon any subject within the city, was vested exclusively in the City Council. The Act 11 Vic. c. 61 was repealed by 14 Vic. c. 15, and this Act by 22 Vic. c. 8. Section 40 of 11 Vic. c. 61 was not re-enacted, but by the 4th section of 14 Vic. c. 15, "the whole legislative power and government of the city" was vested in the City Council, "and in no other power or authority whatsoever." By the 54th section of 22 Vic. c. 8, "the sole power and authority" to make bye-laws for various purposes within the city—one of which was the regulation of markets—was re-affirmed. On the incorporation of York County the powers of the Justices were transferred to the County Council of York, and the title to the market house became vested in the County Council.

Held, that the control and management of the market was in the City Council of the City of Fredericton.

In the absence of express authority to do so, the City Council of the City of Fredericton has no power to close the market, or to impose tolls on the sale of articles in the market house, the market by the grant being a free market.

The repeal of an Act by which it was declared that the market should be free, had not the effect of a legislative declaration that the market in question should not be a free market; but, except for matters done under the Act left the market as though the Act had never existed.

By 30 Vic. (1866) c. 37, s. 3, it is provided that the "City Council" of Fredericton, "shall have power, as heretofore, to impose tolls and rates, and may if they see fit, sell and dispose of or otherwise farm the tolls and rates arising from the wharves, markets," &c.

Held, that this did not authorize the City Council to close the market, which by the grant creating it was free, or to impose tolls on articles sold in the market. *EDWARDS v. BURGOYNE*,228

MASTER—Of Government Steam Dredge liable for negligence of his fellow-servants, 202

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NEGLIGENCE—*Of Contractor—Liability of employer*—S. contracted to erect a building for W. on his (W.'s) land. W. engaged B. to superintend the erection—his duty being to enforce the conditions of the contract, furnish drawings, &c., make estimates of the amount due, and when the building was completed to issue a certificate which, if unconditional, would be an acceptance of the contract. W. also reserved the right to alter or modify the plans and specifications and to make any deviation in the construction, detail, or execution of the work without avoiding the contract, and in case of unnecessary delay, or of the inability of S. to perform the work within a given time, W. might, on giving notice in writing, take possession and carry on the work to completion, charging the same to S. The building to be at the risk of S. until accepted by W.

Held, per WELDON, J., that by the terms of the contract W. retained control over the work, and was liable for an injury to the plaintiff's building, which was the result of S.'s improper and careless execution of the contract.

Per WETMORE, J., that W. was not by the terms of the contract liable for the injury, and if it was sought to make him liable on the ground that he interfered and controlled S. in the execution of the work, that was a question for the jury. *McMILLAN v. WALKER*,31

2—*Placing anchor of Dredge in channel of public harbour—Master must place buoys or signals—Where dredge the property of the Crown, and being used in improving navigation—Liability of master for acts of fellow servants of the Crown*. By the first count of the declaration it was alleged that the master of a Government Dredge placed the anchor of the Dredge in the main channel of a public harbour, with the fluke of the anchor sticking up, and so left it, for an unreasonable length of time, without placing any proper buoy or signal to mark the place of the anchor, and without taking any proper means to guard against accidents to vessels navigating the harbour, and that the plaintiffs' mariners, having occasion to pass out of the said harbour with the plaintiffs' vessel, without any default on their part, ran upon the anchor, and injured the vessel.

Held, that the count described a good cause of action; that the master of the Dredge should have placed a buoy to the anchor to warn vessels navigating the harbour.

NEGLIGENCE—*Continued*.

By the third count it was alleged that the master of a Dredge placed the anchor of the Dredge in a part of the Channel of a public harbour usually navigated by vessels, in a dangerous and improper position, and permitted the same to remain in such dangerous and improper position and that the plaintiff's vessel in passing out of the said harbour in charge of their mariners, without any knowledge on the part of the latter of the improper and dangerous position of the anchor, and without any default on their part, ran on the anchor and was injured, &c.

Held, that the count disclosed a good cause of action.

By the plea the defendant, the master of the Dredge, alleged that the Dredge was the property of Her Majesty, and was being used in dredging out and improving a public harbour, that, for this purpose, dredging, it was necessary to anchor it, and that he directed A. McI. and others to put the anchor out, and that they placed it in the manner alleged in declaration, without any knowledge on his part that it was carelessly and improperly put out, and that A. McI. and the others were not employed by him, but were his fellow servants in the employ of Her Majesty.

Held, that the plea did not afford an answer to the declaration, that the master of the Dredge having directed the men to put out the anchor in a place where it might be dangerous to navigation, could not excuse himself by saying the men were his fellow-servants in Her Majesty's employ, and that he did not know it was negligently or improperly placed there. *LUNT v. LLOYD*,202

3—*Where plaintiff offers no evidence to connect defendant with act of negligence—Effect of such evidence on cross-examination—How far plaintiff entitled to benefit of*. Where in an action for negligence the plaintiff offered no evidence to connect one of several defendants with the negligent act complained of, and the only evidence of such connection, and this very slight, was elicited from the defendant himself in cross-examination.

Held, that there should be a new trial, unless the plaintiff consented that a verdict should be entered for such defendant. *KEENAN v. THE TRUSTEES OF THE LEINSTER STREET BAPTIST CHURCH*,211

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—On the trial of the cause the
to allow defendant's counsel to
see B. what S. had sworn was

PRACTICE—*Continued*.

said by him B. about making a mistake, in order to ask B. whether such statement was true or not.

Held, per **WELDON, J.**, that the Judge was right, and B. could only be asked to give his version of the conversation. Per **WETMORE, J.**, that the statements which the counsel wished to read not being in themselves evidence the Judge should have allowed them to be read to the witness, for the purpose of contradiction.

The defendants appeared by the same attorney, but were represented at the trial by separate counsel.

Held, per **WELDON, J.**, that only one counsel had a right to cross-examine and address the jury. Per **WETMORE, J.**, that at all events the Judge should have satisfied himself that defendants' interests were identical before refusing to allow the counsel for both to cross-examine and address the jury. **McMILLAN v. WALKER**, 31

2—*Rule Nisi*—Where not entered on Crown paper—When applicant entitled to have made absolute.] A rule nisi having been taken out and served, requiring defendants to shew cause at this term why a certain conviction made by them as Justices should not be quashed, they did not enter the case on the Crown paper.

Held, That the second motion day of the term was the proper time for moving to make the rule absolute. **REGINA v. DAYTON**, ... 195

—Where cause had been noticed for trial and entered at the Circuit—Court will presume cause was at issue, 165
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—If in an action for negligence against a number of defendants, no evidence is produced against one of them, he is entitled to have a verdict of acquittal entered for him at the end of the plaintiff's case, 211
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RAILWAY COMPANY—*Right to grant running powers over its line to another Company—Power of Railway Company to contract after the time limited by Act of incorporation—Specific performance of contract—When equity will enforce—Lease—Entire rent reserved—Consideration illegal in part*. The Grand Southern Railway Company was incorporated by 35 Vict. c. 47, (passed 11th April, 1872,) for the purpose of constructing a railroad from the city of Saint John to St. Stephen, the capital stock to consist of at least \$2,000,000 and the liability of the stockholders restricted to the amount of stock they held; \$50,000 of the stock subscribed to be paid in before the operations of the company commenced; and that to entitle the company to the privileges of their charter the construction of the road should commence within three years, and should be *bona fide* continued from year to year, so that the whole be completed within eight years from the passing of this Act. No stock having been paid in under this Act, the time for commencing the construction of the road was extended by 37 Vict., c. 85; but the time for completion remained as before, and the company was authorized to commence the construction of the road as soon as \$20,000 of the stock was "subscribed" for, \$24,000 was subscribed for, but only \$1,240 was paid in. The company did not complete the road within the time limited (11th April, 1880), and the Legislature refused to extend the time. On the 20th January, 1876, the company contracted with the Government to construct the railway mentioned in the Act of incor-

RAILWAY COMPANY.—Continued.

poration; to commence work by the 31st December following, and to complete the road by the 11th April, 1880, the government having power to terminate the contract by a six month's notice, unless the company gave satisfactory proof that the work was proceeding so as to be completed within the time limited. In January, 1879, the Government gave the company a notice under the terms of the agreement.

By Act 33 Vict., c. 39, the Carleton Branch Railway Co. was incorporated for the purpose of constructing a railway from the west side of the harbor of St. John to The European & North American Railway near Fairville, with power to take and hold land &c., and provided that lands taken by the company should be held as lands taken and appropriated for highways. On the 30th April, 1880, the Grand Southern Railway Company (respondents) entered into an agreement with the Carleton Branch Railroad Company (appellants), whereby the appellants granted to the respondents for a term of fifteen years the right to connect their railway with the appellants' railway, and to run their train over it, and to lay down sidings, &c., and also demised to the respondents certain lots of land, with the right to build station houses and freight houses on one of the lots; reserving to the appellants for the lands demised, and the rights and privileges granted, an annual rent. It was also agreed that, if during the fifteen years the respondents could not use the track on the Carleton Branch railroad, for certain specified causes, they (respondents) might build a track for their own use alongside of the appellants' railway, with necessary earth works, &c. And in case such track was constructed the respondents should pay the appellants a certain specified rent per annum, for so long thereafter as they should use the land for that purpose, and that they should have the right to use and maintain the second track at the special rents for 999 years.

The respondents filed a bill, alleging that on the 2nd June, 1880, they commenced to grade their line of railway so as to connect with the Carleton Branch Road, but were prevented by the appellants. The Bill prayed that it might be declared that the Carleton Branch Railway Co. was bound to perform and execute the agreement entered into with the respondents, and should be enjoined from preventing or obstructing the respondents from uniting their railway with the appellants' line, and from interfering with or hindering the respondents from passing with their locomotives, &c., over the appellants' road, in accordance with the agreement of the 30th

RAILWAY COMPANY.—Continued.

April, 1880. An injunction order having been granted in the terms of the prayer :

Held, on appeal, by ALLEN, C. J., and DUFF, J., (WELDON, J., dissenting),

1. That the bill was, in effect, a bill for specific performance of an agreement, and before the Court would enforce it, it must be satisfied that there was no reasonable ground to contend that the agreement was illegal, or against the policy of the law.

2. That the agreement of the 30th April, 1880, having been entered into after the time limited by the Act incorporating the Grand Southern Railway Co. for the completion of the road, was *ultra vires* and void.

3. That the agreement was not such a one as a Court of Equity would attempt to enforce; and whether it was valid or invalid, in view of the financial condition of the Grand Southern Railway Co., it was not an agreement which the Court ought to be active in enforcing.

4. *Semble*, That though the Carleton Branch Railway Co. might grant to another company a right to connect with their railway, and have running power over it, it had no power to grant to another company a right to construct a separate track alongside its own line, or to make such a demise of its lands as purported to be made by the agreement of 30th April, 1880.

5. That if the demise of the lands to the Grand Southern Railway Co. was illegal, it vitiated the grant of the easement or running powers over the Carleton Branch Railway, because one entire rent was reserved in respect to both; and the legal part of the consideration could not be severed from the illegal part.

Held, per WELDON, J., that as the effect of the injunction order was merely to preserve the *status quo*, until the rights of the parties could be determined on the hearing, the appeal should be dismissed. **THE CARLETON BRANCH RY. CO. v. THE GRAND SOUTHERN RY. CO.**, 339

2—*Liability to fence—Occupier of adjoining land*—41 Vic. c. 92, s. 22.] By Act 41 Vic. c. 92, sec. 22, a railway company were bound to erect and maintain sufficient fences on each side of their line where it passed through enclosed or improved land, and were made liable for all damages sustained by reason of neglect to maintain such fences. Plaintiff's cow strayed from his land into the highway, and land belonging to H. adjoining, and from thence out upon the track through a defective fence, and by a train, but without any negligence in the management of the train.

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Held, that the obligation to fence was general, and not merely as against the occupiers of land adjoining the railway; and that the company were liable for killing the cow. **ST. JOHN RY. CO. v. MONTGOMERY**, 441

RAILWAY CONDUCTOR—Intercolonial Railway—Negligence of Conductor—Accident to passenger—Right of Action—Contributory negligence.]

Plaintiff having a first class ticket from Sussex to Penobscis by the Intercolonial Railway, intended going to Penobscis (her home) by the mixed freight and passenger train, which was due to leave Sussex at 1-47 p. m. The train on that day was an unusually long one, and when the passenger cars were brought to the platform the engine was across the public highway. When the train came in it was brought up so that the forward part of the first class car was opposite the platform. It was then about ten minutes after the advertised time of departure. Plaintiff was standing on the platform when the train came in, but did not then get aboard. The conductor of the train (the defendant) got off the train and went to a hotel for dinner. While he was absent the train was, without his knowledge, backed down, so that only the second class car remained opposite the platform. The jury found that the first class car did not remain at the platform long enough to enable plaintiff to get on board. The defendant, after finishing his dinner, came over hastily (being behind time and therefore in somewhat of a hurry) called "all aboard," glanced down the platform, saw no person attempting to get on board, crossed the train between two box cars to signal the driver to start, (it being necessary to cross the train in order to be seen by the driver, owing to a curve in the track), and almost immediately the train started. The 124th regulation for government of the Intercolonial Railway, prescribes that conductors must not start the train while passengers are getting on board, and that they should stand at the front end of the first passenger car when giving the signal to the driver to start, which he did not do in this instance. Plaintiff and a lady friend, F., who was going by the same train, were standing on the platform, and when they heard the call "all aboard," they went towards the cars as quickly as they could. F. got on all right, but plaintiff (who had a paper box in her hands) in attempting to get on board caught the hand rail of the car, when she slipped owing to the motion of the train and was seriously injured. The jury found that the call "all aboard" was a notice to passengers to get on board.

RAILWAY CONDUCTOR.—*Continued.*

Held, by ALLEN, C. J., and WETMORE and KING, JJ., that although the plaintiff's contract was with the Crown, the defendant owed to her, as a passenger, a duty to exercise reasonable care, and that there was ample evidence of negligence for the jury. But, per WELDON, J., that the defendant having brought the first class passenger car to the platform, it then became (by the regulations) under the control of the station master and defendant was not liable for starting the train from the position it had afterwards been placed in, also that it was plaintiff's duty to have gone on board as soon as the train came to the station. *HALL v. MCFADDEN*, ... 586

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SHERIFF'S SALE—*Bidding by plaintiff who had forbidden sale not evidence of leave and license—Measure of damages—Evidence.*] In an action of trespass by the husband and wife against the defendant, Sheriff of Queens for taking the property of the wife under an execution against the husband, the defendant, on the trial, was allowed to add a plea of leave and license. The evidence offered to support the plea was the fact of the female plaintiff having attended the sheriff's sale and bid in some of the goods. She had previously forbidden the sale, and the defendant in his evidence stated he took the goods and sold them under the execution. It also appeared that she purchased the goods at a low price, no one bidding against her. The Judge directed the jury that there was no evidence to support the plea, and that the fact of the wife buying the goods at a low price did not affect the question of damages; the defendant would be liable for the value of the goods.

Held, that the direction was good.

Application to add a plea of leave and license was made after evidence that the female plaintiff had bid at the sale was given, and on the ground that this supported the plea. The defendant in his evidence claimed to sell adversely to the plaintiffs under an execution against the husband. Subsequently the defendant's counsel, without stating by whom he would prove it, offered evidence to shew the plaintiff's assent to the sale, which was refused.

Held, rightly so. *SCOTT v. PALMER*, ... 304

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SLANDER—*Pleadings—Evidence—Setting out all the material words constituting the slander—Variance.*] In the first count of the declaration it was alleged that the defendant

SLANDER.—Continued.

spoke the following words about the plaintiff: "Go and get a search warrant and you will get your pork there," meaning thereby that the plaintiff had feloniously stolen pork. The words proved were "Go and get your warrant and you will get your pork." These words were spoken by the defendant in the course of a conversation with one B., who stated that his pork had been stolen, and that he thought of taking out a search warrant to search the plaintiff's place. The Judge directed the jury that the words as laid were not proved and withdrew that count from their consideration.

Held, (by ALLEN, C. J., and DUFF and KING, JJ., WELDON and WETMORE, JJ., dissenting), that the words as laid were capable of the defamatory meaning attributed to them when read in connection with the facts in evidence, and that the words were sufficiently proved, and the count should have been left to the jury.

By the fifth count of the declaration the plaintiff alleged that the defendant falsely spoke and published of him the words following: "Judson Harris in there," meaning thereby that the plaintiff had feloniously stolen pork. Some pork had been stolen from B. According to the evidence of one of the plaintiff's witnesses the defendant during the forenoon of the day on which it was said these words had been used, said he knew where the pork was, stating where, and intimating that he knew who stole it. Being asked by the witness during the afternoon, whom he meant, he said "Judson Harris in there."

Held, That the count was bad in not setting out all the material words constituting the slander. *HARRIS v. CLAYTON*,.....237

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STAMP ACT—(42 Vic. cap. 17)—*Double stamping under sections 13 and 25—Holder—Reasonable time—Insolvent Act sec. 136—Liability under.*] Defendants drew a bill of exchange in three parts on S. in Liverpool, payable to their own order, indorsed it, and sent it to the plaintiffs' manager with a letter requesting him if agreeable to place it to defendants' credit at best rates possible, and also requesting the manager to put on necessary stamps and deduct from proceeds. Stamps were put on the bill in the bank, but

STAMP ACT.—Continued.

it did not appear by whom, and they were not cancelled. The bank discounted the bill, and the defendants received the proceeds. The bill was not accepted; and in an action by the bank against the drawers, the first count of the declaration stated, in addition to the usual allegations of drawing and dishonor of the bill, that the defendants falsely and fraudulently represented that they had a right to draw it, whereby the plaintiffs were induced to discount it, and to advance the defendants money upon it. The plaintiffs having failed to prove the count on the bill—

Held, That as the charge of fraud was alleged to have been in reference to the money obtained by the defendants on the bill, they were not liable under section 136 of the Insolvent Act, though the plaintiffs obtained a verdict against them for the same demand on a count for money lent.

On the trial, only one of the parts of the bill was offered in evidence, and objection having been taken to the stamp, the manager of the bank proved that he had no knowledge of the defect till then. The evidence to disprove knowledge and the arguments of counsel extended into the second day of the trial, when a double duty stamp was affixed to the bill, and it was received in evidence.

Held, per ALLEN, C. J., WETMORE and PALMER, JJ., (KING, J., dissenting), that the manager of the bank having only a limited authority to issue the bill when properly stamped, and the stamping being insufficient, the defendants were not liable.

Per ALLEN, C. J., that section 13 of the Stamp Act, (42 Vic. c. 17) authorizing the affixing of double duty stamps, did not apply where the holder of an unstamped bill received it from the drawer with instructions to stamp it.

Per ALLEN, C. J., and WELDON, J., that where a banking company becomes the holder of an unstamped bill with instructions to stamp it, and they do it insufficiently, they are precluded by section 25 of the Stamp Act from rectifying the error by affixing double duty stamps at the trial, though they have not been previously aware of the defect.

Per PALMER, J. 1. That under section 25 it was the duty of the bank to affix the double duty stamps at the first reasonable opportunity after discovering the defect; and it was too late to do so on the trial on the second day after the defect was brought to their knowledge. 2. That if double duty stamps could be affixed, it was sufficient to affix them to the part of the bill offered in evidence. *BANK OF NOVA SCOTIA v. CUSHING*,498

- STAY OF ACTION**—*Executor—Separate actions for penalty for not proving Will.*] Where separate actions for not proving a will were brought against two executors, under the Rev. Stat. c. 136, s. 10, (Consol. Stat. c. 52, s. 11), the proceedings in one action were stayed till after judgment in the other. (WETMORE, J., dissenting). *MAGNER v. HUTCHISON*; *THE SAME v. SULLIVAN*,....537
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- TROVER**—Lien—Persons entitled to hold goods for—*Claiming to hold for other charges—Tender—Waiver—Conversion*]. The defendants, merchants in St. John, instructed plaintiffs, commission merchants in New York, to purchase for them a quantity of corn and ship to St. John. On arriving in St. John, the corn was found to be heated and musty and defendants refused to receive it, and notified plaintiffs they held it subject to their order. Plaintiffs consented to assume the invoice and directed defendants to sell for them to best advantage. Defendants undertook to sell but were unable to find a purchaser and it remained on their hands for a long time. A dispute having arisen concerning it, plaintiffs demanded it, and defendants
- TROVER**—*Continued*.
refused to give it up until various charges and expenses for which they claimed a lien, and of which they had given plaintiffs a memorandum, were paid. The goods were not subject to a lien for some of the charges for which defendants claimed to hold.
Held, by WELDON, J., that the defendants having furnished plaintiffs with a memorandum of the items of the different charges for which they claimed a lien, there was no waiver of their lien for proper charges, and in the absence of a tender of those charges, their refusal was no evidence of a conversion.
Held, by WETMORE, J., that defendants having claimed to hold for charges which were not a lien upon the property, their refusal to deliver until those charges were paid was a waiver of their lien for proper charges and dispensed with the necessity of a tender of them. *NEVIUS v. SCHOFIELD*,.....124
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- WILL**—*Execution—Signature by testator—Presumptions where no positive evidence of signature being to will when attested by witnesses—What a sufficient acknowledgment in the presence of witnesses—Evidence—How far attestation clause may be—Witnesses signing in each other's presence*]. If a testator produces a paper and asks persons to sign it, giving them to understand that it is his will, it is not necessary to have direct evidence that his signature was on the paper when he asked

WILL.—Continued.

them to sign it; but the court is at liberty to judge from all the circumstances of the case whether his signature was there at the time or not.

To a will written in the testator's handwriting and concluding with the following *testimonium* clause: "In witness whereof I have hereunto set my hand and seal," etc., was an attestation clause, also in the testator's handwriting as follows: "The said Alexander Ferguson" (the testator) "this, etc., sealed and delivered this instrument as and for his last will and testament, and we, at his request and in his presence and in the presence of each other have hereunto written our names as subscribing witnesses." (Signed) "Charles McKeen, William McKeen." When produced, the will bore the testator's signature in the usual place. It was not signed in the presence of the witnesses, and there was no evidence that either of them saw his signature to the paper when they subscribed it as witnesses. The testator brought the will to the witnesses' shop, and told C. McK., one of them, it was his will, and asked him to sign it. The other, W. McK., a brother of the first, coming in at the time, the testator said, "Let your brother sign also," which the latter did without knowing what the paper was. He did not remember seeing his brother sign it. He did not know what the paper was and no one told him.

Held, (by ALLEN, C. J., and PALMER, J., DUFF, J., *dubitante*), that it might be presumed that the testator signed it before he went to the shop and that it was then a complete instrument so far as he himself could complete it.

Held (by ALLEN, C. J., and DUFF, J., PALMER, J., *dissenting*) that there was not an acknowledgment by the testator of the will in the presence of the witnesses as required by the Act. (Consol. Stat., c. 77, s. 5.)

By DUFF, J., that there was not a proper attestation by the witnesses in the presence of each other.

By PALMER, J., that looking at the attestation clause there was sufficient evidence of the witnesses having signed the will in the presence of the testator and in the presence of each other to justify the court in upholding the will. *In re THE GOODS OF ALEX. FERGUSON*, 71

2—Construction of—Authority to rebuild buildings destroyed by fire—Where buildings destroyed in testator's lifetime—Description of new buildings—Effect of change in the building laws—Power to sell—A mortgage not as a general rule a due execution of a trust for sale and conversion—Insurance—Whether

WILL.—Continued.

trustees can increase insurance when directed to insure in about the amount in which testator insured—Annuity—When chargeable on a particular fund—When on corpus of estate—Division of annual income of residuary estate—Division of residuary estate—Parties consenting to a decree bound by it—Costs—Appeal.]

The testator devised his house and other buildings on Charlotte street, Saint John, to trustees upon trust, during the life of his wife, to permit her to have the use and occupation of them, and of any building which in case of fire might be substituted in lieu of or to replace the same, and to receive the rents and profits thereof to her own use and benefit. After his death this property was to be conveyed to the rector of Trinity Church, Saint John. He devised his real estate in Queen's Ward, and certain stocks and bonds to them, upon certain trusts, and charged the real estate, stocks and bonds with the payment of an annuity of \$5000 to his wife. The will then continued:—"Which annuity shall commence from my decease and be paid quarterly without deduction. And I direct that my said trustees shall stand seized and possessed of this last mentioned real estate, stocks and bonds, and the annual rents, profits, dividends and interest thereof upon trust, by and out of the said rents and profits, dividends and interests, to pay to my said wife the said annuity or clear yearly sum of \$5000 during her life, by even and equal quarterly payments in each year; the first quarterly payment thereof to fall due and be payable at the expiration of three months from and after my decease, and as to the surplus of the said rents, profits, dividends, and interests which shall remain in each year, during the life of my said wife, after payment of the said annuity to her, I direct my said trustees to pay and apply said surplus in like manner as is directed as to the annual income of my residuary estate." The testator also directed the trustees generally to manage the real estate, to keep the house and other buildings on Charlotte street, and the buildings on the Queen's Ward properties in tenantable repair, and insured against loss by fire in about the amounts the testator had then insured upon them, and in case of loss to apply the insurance money towards repairing the damage or in erecting new buildings in lieu of those destroyed; giving them power to erect buildings of a like or of a different character on the same site. In case the insurance money should prove insufficient for the purpose, power was given to use and apply such a portion of the capital of the residuary real and personal estate, not charged with the widow's annuity, as the trustees should deem neces-

WILL.—Continued.

sary. All matters and things done in reference to the Charlotte street buildings were to be done with the widow's consent and subject to her approval. The trustees were authorized after the expiration of one year from the testator's death, and at such times thereafter as they should deem most advantageous, to sell the property not charged with the widow's annuity and to stand possessed of the proceeds upon the trust therein declared. The buildings were burned in the testator's lifetime, and he collected the insurance moneys, with the exception of \$700, a balance due in respect of part of the Queen's Ward properties. This amount was paid to the trustees. The Queen's Ward properties were in the business centre of the city, and without the buildings would bring in little, if any, rental. The testator had commenced to rebuild on one of these properties, all of which continued to belong to him up to the time of his death, and vested in his trustees under the devise to them.

Held, affirming the judgment of the Court below, that as the clear intention of the testator was to provide a residence for his wife during her life, the trustees were authorized to rebuild the house and other buildings on Charlotte street.

Held, that the order of the Court below, that "the trustees were bound to rebuild the dwelling house and such other buildings as were necessary for the comfortable enjoyment of the premises by the widow, of the character, dimensions and capacity, with such offices and appliances as were standing thereon before the fire, as near as might be, consulting the wishes and desires of the widow, and conforming thereto in regard to the dwelling house and appurtenances, and to such changes and alterations therein as she might desire for her personal comfort, so as there should be no material or substantial change therein in any respect, to the injury of the inheritance or otherwise," did not go beyond the powers given to the trustees by the will. Also that the trustees must build such buildings as the law at the time of building allowed.

Held, affirming the judgment of the Court below, that the trustees were authorized to rebuild the buildings on the properties in Queen's Ward.

Held, varying the judgment of the Court below, that the trustees were not authorized to raise the money necessary for rebuilding by mortgaging some part of the real estate not charged with the annuity to the wife.

Held, affirming the judgment of the Court below that the trustees might insure any

WILL.—Continued.

new buildings which they might erect, in such sums as they thought necessary to protect the interests of the estate.

Held, affirming the judgment of the Court below, that the testator intended to bequeath to his wife an annuity of \$5,000, and that in case the particular property upon which it was made a charge should prove insufficient for that purpose, the amount should be paid in full out of the residuary estate.

After giving a number of general and specific legacies the will directed the trustees to convert the residuary personal estate, not consisting of moneys invested in stocks, funds or securities yielding income, and at their discretion either to get in the moneys so invested, or to allow them so to continue, and after paying the testator's debts and testamentary expenses and the several legacies, to invest the surplus produce thereof, pursuant to general directions for investments therein after declared. After certain directions as to how sales of real estate should be made, the will proceeds as follows:—"And I direct that my said trustees shall stand possessed of the real estate charged with the said annuity" (to the widow) "subject thereto and of the proceeds thereof when sold, and of all other residuary estate, and of the proceeds thereof when sold, and the investments thereof, and the residue of my personal estate remaining after payment of my debts, funeral expenses and legacies * * * and the investment of said residue of my said personal estate, and also after the decease of my said wife, of the said 160 shares of capital stock of the Bank of New Brunswick, and the said £2,000 in bonds of the Mayor, &c., of the City of Saint John, subject however to any deduction therefrom directed or authorized to be made by this my will upon trust as to one third part thereof for my nephews, John A. Wright, Charles H. Wright, Alexander W. Wright and Octavius Wright, share and share alike, * * * and as to one third part of such residuary estate as aforesaid upon trust, to pay unto my brother Nehemiah the net interest and dividends and annual income thereof during his life, for his own absolute use and benefit, and after the decease of my said brother Nehemiah to pay the said one third part to and among the children of my said brother Nehemiah, share and share alike. * * * And as to one other equal third part thereof, to pay the same to Jane Elizabeth, the wife of my late brother George, for her own absolute use and benefit forever." * * * The taxes on the property charged with the annuity to the wife were directed to be paid out of the residuary estate, and directions were given

WILL.—Continued.

for the investment of the residuary estate in certain specified securities.

Held, that the will gave no authority to the trustees to pay over the income of any portion of the residuary estate to the Messrs. Wright or to Mrs. Jane Elizabeth Merritt during the widow's lifetime. But as all parties interested in the residuary estate had consented to the Court below making a decree allowing this to be done, the appellant, who was one of the assenting parties, must be bound by it.

Held, that the trustees were not authorized to divide the residuary estate during the widow's lifetime, and that the residuary legatees had no right to claim a division on giving security for the payment of the widow's annuity. *MERRITT v. WRIGHT*, 135

3—Construction of—Word "*Heirs*"—Construed same as "*Children*" or "*Issue*"; where such was clear intention of testator. Wills ought to be so interpreted as not to defeat the intention of the testator by technical rules of construction; but by considering the language in a free, liberal and common sense spirit, to give effect to the manifest intention.

Therefore the word "*heirs*" was construed as a word of substitution, and held to have the same effect as the word "*children*" or

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"*issue*," such being the manifest intention of the testator. *OTTY v. CROOKSHANE*, 169

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